HANDBOOK OF ADMINISTRATIVE PROCEDURE

By Roger Tippy

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About the Author

Roger Tippy was with the Montana Legislative Council from 1973 to 1977, drafting most of the bills on state administrative law introduced in that period and staffing the legislature's Administrative Code Committee after its creation in 1975. Before 1973 he practiced in Massachusetts, in the state Attorney General's office and as staff attorney for the New England River Basins Commission. He was educated in the public schools of Phoenix, Arizona, and at Stanford University and Yale Law School (1965). He opened his own office in downtown Helena in September of 1977.

A C K N O W L E D G M E N T S

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Roger Tippy
Helena, February 1978

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INTRODUCTION

Contrary to various popular beliefs, the Montana Administrative Procedure Act is neither (a) a blank check drawn payable to empire-building bureaucrats, nor (b) a mine field full of peril for the unwary state agency administrator, nor yet (c) an arbitrary collection of ukases imposed upon the bench and bar. The statute does suffer from a deficiency of information regarding its purposes, which condition has allowed each of the above myths to flourish. This book is intended to fill some of that information gap.

The most fundamental principles of a state administrative procedure law were stated in a 1977 resolution of the American Bar Association:

1) State agency rulemaking normally be preceded by notice and an opportunity for interested persons to submit views or information.

2) Procedural rights in state agency adjudicative hearings be set forth by the statute with such particularity as may be feasible, in order to secure fairness coupled with efficiency. Matters worthy of consideration in this connection include requirements of adequate notice, rules of evidence, contents of the record, basis for the decision rendered, impartiality of the adjudicator, and the like.

3) State agency rules be published, and other state agency law or policy affecting rights of the public be made available generally for public inspection.

4) State agencies adopt rules describing the procedural rights of the public in their dealings with the agencies.

5) Adequate judicial review of agency action be provided. [1]

About two-thirds of the states have enacted laws which meet these criteria (including every western state with the partial

[1] 63 A.B.A. Journal 1234 (Sept. 1977)

exceptions of Utah and Kansas) and the ABA resolution encouraged the remainder to follow them. Montana joined the majority in 1971. The 1971 legislature which enacted MAPA was in the headlines for other activities--the sales tax controversy, executive reorganization, and facilitating the upcoming constitutional convention most notably. Still, the administrative procedure legislation did not slip into the session laws quietly. The bill had been drawn up over the preceding interim by Professor John McCrory, then of the UM law school, in consultation with an interim legislative committee.[2] Introduced as Senate Bill 21 of the 42nd Legislature, it moved through the Senate and House with minor amendments and arrived on the desk of Gov. Forrest Anderson in March. Anderson vetoed the bill on March 16, stating that it "affords sweeping powers to the office of the Governor which could be abused" and conflicted with the timetable for executive reorganization.[3] He added that the principal sponsor of the bill (Senator Jean A. Turnage) had agreed to reintroduce a revised version in the special session then sitting with changes made to meet the governor's objections.

Turnage and cosponsoring senators then introduced Senate Bill 5 of the First Special Session; it differed from the vetoed bill at four substantive points: it dropped a two-year limitation on technical challenges to the adoption of a rule (see Handbook text ¶ 13.2), it revised the procedural for disqualification of a hear-

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[2]McCrory's recent law review article recounts some details of this phrase. "Administrative Procedures in Montana", 38 Mont. L.Rev. 2-3, (1977).

[3]Sen.Journal, 42nd Leg., 1st Ex.Sess. 22 (1971).

examiner or agency member (see text ¶ 25.2), it modified the provision on representation by counsel (see text ¶ 37.2), and it moved the effective date back eighteen months. More changes followed quickly. The Senate Judiciary Committee reworked the section on ex parte consultations (see text ¶ 28.2), and then the House Judiciary Committee amended the provisions on evidence in contested cases (see text ¶ 23.2). Two conference committees were necessary to resolve differences. By the time the bill was signed into law, the legislature had revised about ten of McCrory's proposals.

The state bureaucracy proceeded to implement MAPA and executive reorganization in the same time span, generally 1972 and 1973. The interaction of these two processes, and of both with the state classification and pay plan after 1973, should someday furnish a historian of bureaucracy the material for an interesting thesis. A larger and more professional bureaucracy emerged and found in MAPA a "how-to" kit for building many of the details of administrative organization. Without MAPA, the bureaucracies would probably have grown at a similar pace but with many more variations from agency to agency.

The Secretary of State published a Montana Administrative Code, about 3,200 pages of existing agency rules, in mid-1973. By the end of 1977, this compilation had more than doubled in size. Growth was a function of the creation of new agencies, delegation of new authority to existing agencies, removal of exemptions from the original MAPA for several agencies, and the new exercise of old rulemaking powers by agencies with expanded staff resources. The other functions for which MAPA furnished

blueprints--adjudication of contested cases and interpretation by declaratory ruling--grew more slowly or not at all. The growth of rulemaking, being more measurable than any factor save growth of agency payroll, became a focal point for popular dissatisfaction with state bureaucracy. Since 1973 every session of the legislature has tinkered with MAPA's rulemaking provision in efforts to corral the burgeoning herd of rules. Legislative control of rulemaking is another trend which has been spreading in the '70's although no two legislatures go about it in the same way and some of Montana's procedures, such as the polling by mail of all legislators on a proposed rule, are quite unique.

Reference to other states brings up the ancestry of MAPA, and statutory genealogy is an important part of this handbook. The raw material for McCrory's recommendations was the Revised Model State Administrative Procedure Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1961. There had been an original Model State APA proposed in 1946; the 1959 Montana legislature had looked at but not enacted a bill based upon this proposal. The 1959 bill is described in Sullivan, The Case for an Administrative Procedures Act, 21 Mont. L.Rev. 167 (1960), and McCrory borrowed some language from that bill for MAPA. The Revised Model State Act was accompanied by brief Commissioners' Notes on each of its provisions, while a more detailed gloss on the Revised Model Act was written by Frank Cooper in 1965 as the heart of his two-volume treatise State Administrative Law. McCrory's recommendations were printed as the Montana Administrative Procedures Study which he delivered in two volumes to the Legislative Council in 1970; this material

is especially pertinent where he drafted variations on the Revised Model Act language.

Writing at the same time as McCrory was Professor Kenneth C. Davis, the preeminent national commentator on administrative law. In the 1970 Supplement to his Administrative Law Treatise, Davis castigated the Revised Model State Act as "hardly a model... scarcely a beginning of what a state act should be."[4] Several of Davis' counterproposals were picked up by the legislature's Administrative Code Committee and put in House Bill 77 of the 1977 legislature, the committee's bill which revised substantial portions of MAPA. The committee published a report in December 1976 detailing and explaining its proposals.

In the plan of this book the comments in McCrory's work (abbreviated as Study) and the Administrative Code Committee's report (abbreviated as Report) are treated as legislative history documents since they were before the members of the 1971 and 1977 legislatures which voted on the enactment and revision of MAPA. Relevant quotations from these sources appear in a "derivation and purpose" passage following the text of each MAPA provision. The notes of the Commissioners on Uniform State Laws also appear under derivation and purpose, since these comments were addressed to the various legislatures and also since the Montana Supreme Court has referred to these notes in construing MAPA.[5]

The comments of Cooper and Davis on the Revised Model State Act are set forth in a "commentary" passage following those MAPA

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[4] *Op.cit.*, § 1.04-6.

[5] *Vita-Rich Dairy, Inc. v. Dept. of Business Regulation*, Mont. 553 P.2d 980 (1975).

provisions which still resemble their model act progenitors. The commentary sections also include the observations of this writer from time to time. Sandwiched between the derivation/purpose and the commentary sections, when available, are "construction" notes on the interpretations of MAPA by the state Supreme Court and other authorities in Montana. Interpretations of similar provisions by the courts of other states is outside the scope of this handbook; researchers looking for such interpretations should expect to find them mainly for those MAPA provisions which remain similar to the model act language. Finally, where appropriate, there is a passage for cross-references and forms for some of MAPA's applications. Forms not available in other publications have been distilled from various agency files and printed as an appendix to the handbook.

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1. SHORT TITLE

1.1 TEXT R.C.M. 82-4201; prop. M.C.A. 2-4-101

This part (82-4201 through 82-4225) shall be known and may be cited as the "Montana Administrative Procedure Act".

HISTORY: En. § 1, c.2, Ex.L.1971; am. §1, c.285, L.1977.

1.2 DERIVATION AND PURPOSE

The 1977 amendment changed "this act" to "this part" and inserted the section number references. The purpose of the change was to clarify the relationship of MAPA to the 1975 public participation act, codified at R.C.M. sections 82-4226 through 82-4230. Administrative Code Committee Report, p. 19. The legislature did not enact the participation statute as an amendment to MAPA but as a separate law implementing Article II, section 8 of the Montana constitution; due to the affinity of subject matter, the Legislative Council assigned the statute section numbers in the same chapter as MAPA.

2. DEFINITIONS - "AGENCY"

2.1 TEXT R.C.M. 82-4202(1); prop. M.C.A. 2-4-102

"Agency" means any agency, as defined in 82-4227, of the state government, except that the provisions of this part do not apply to the following:

(a) the state board of pardons, except that the board shall be subject to the requirements of 82-4203 and 82-4205 and its rules shall be published in the Montana administrative code and register;

(b) the supervision and administration of any penal institution with regard to the institutional supervision, custody, control, care, or treatment of youths or prisoners;

(c) the board of regents and the Montana university system;

(d) the financing, construction, and maintenance of public works.

HISTORY: En. § 2, c.2, Ex.L.1971; am. § 2, c.285, L.1977.

2.2 DERIVATION AND PURPOSE

McCrory derived the original wording from § 1(1) of the Revised Model State Act with the following variations: the words "of the state government" were inserted to more strongly reflect an intent to exclude from coverage agencies of local government (Study, II, p.2); and following the Model Act's exclusion of the legislative and judicial branches, exclusions for the office of the governor, military and civil defense agencies, the board of pardons in part, the functions of penal, mental, medical or eleemosynary institutions, the administration and management of educational institutions of all types, and the financing, construction and maintenance of public works were added. Also, the Model Act's functional definition of an agency (authorized to make rules or determine contested cases) was changed in the bill by substituting "and" for "or". This was an apparent inadvertance, for McCrory's accompanying notes employ the disjunctive "or".

Notes on the specific exclusions show that the military was left out due to "the impracticality of requiring that it comply with the procedures," that the Board of Pardons' "broad discretionary powers...warrant an exemption from coverage," which did not, however, "diminish the need for public information regarding its substantive and procedural rules," and that supervision and administration of state institutions were exempt "because, to a large degree, such matters are regulated by statute and

and directly involve basic constitutional rights." He added, on the institutions, that "determinations regarding such matters can be handled better by courts than by administrative bodies," and that "it would not be practical for institution personnel to follow MAPA procedures for many determinations and judgments which they must make, particularly with regard to individual inmates, prisoners or patients." (Study, II, p.3)

Educational functions were left out because of a revision of state educational laws then pending, with the observation that the justification for this exemption should be reviewed at a later date. The public works exemption was made "so as not to jeopardize construction schedules, financing plans or eligibility for federal aid programs." (Study, II, p.3)

The 1977 amendment deleted most of the basic definition and substituted a reference to another definition of "agency" at 82-4227, the public participation statute. The condition "of the state government" was left undisturbed because the public participation statute covers local as well as state bodies, while MAPA still applies to state agencies only. The functional portion of the definition becomes, by reference, "authorized to make rules, determine contested cases, or enter into contracts." The conjunctive "and" was replaced by the disjunctive "or", indicating that any one of the three attributes makes a state entity an agency for MAPA purposes.

The exemptions of the legislative and judicial branches, the office of the governor, and the military and civil defense agencies are set out in 82-4227 and thus by reference continue in MAPA. The Board of Pardons partial exemption and the public works exemption were not amended, but the educational and institutional exemptions were narrowed by the 1977 amendment. The educational exemption was limited to the Regents and the university system, thus bringing the Board of Public Education and State Superintendent of Public Instruction under MAPA. The Administrative Code Committee, in advancing this change, noted that elementary and secondary education standards are made under statutory authority and are of a general and statewide nature like the rules published by other agencies; the Regents, however, "make rules under authority of the constitution rather than under statutory delegated by the legislature." Report, pp.17-18

The committee's bill, as amended, struck the terms "mental, medical or eleemosynary" and "inmates...or patients" from the institutions exemption, cutting it back to penal institutions. It also struck the operations of admission and release with reference to penal institutions and added the words "youths or" preceding "prisoners". The committee noted that recent statutes and court decisions have

made "the treatment and rights of institutionalized persons matters of public concern. Repealing the blanket exemption of institutions rules now in the APA would lead to formal notice and consideration of those policies which involve the rights of institution residents and their relatives. The committee notes that statements affecting only the internal management of an agency and not the public are still excluded from the definition of a rule, and expects that the minutiae of running an institution will not have to be published in the Administrative Code." Report, p. 18.

2.3 CONSTRUCTION

(a) "of the state government" (Sup. Ct. 1976): Though city police commissions are creatures of state statute, they are obviously entities of local government. Metropolitan police commission is not a state administrative agency as defined in the MAPA. *Miscovich v. City of Helena, 551 P.2d 995.*

(b) "board of pardons, except that" (Atty. Gen. 1977): Act partially exempts Board of Pardons, but Board is subject to 82-4203. Policy of postponing consideration of clemency applications pending exhaustion of administrative remedies would be a "procedure" covered by this section, requiring adoption of a rule. 37 Ops. Atty. Gen. No. 43, 1977 Mont. Adm. Reg. 161

2.4 COMMENTARY

The board of trustees of a school district is generally understood to be a unit of local government, and thus unaffected by the coverage of the statewide elementary and secondary educational agencies. Regarding the mental, etc., institutions, legislative attention in 1977 was focused on the Department of Institutions' rule-making functions; the impact of MAPA's contested case provisions on institutional operations has not been assessed.

DEFINITIONS - "RULE"

3.1 TEXT R.C.M. 82-4202(2); prop. M.C.A. 2-4-102

"Rule" means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. Substantive rules are either legislative rules, which if adopted in accordance with this part and under expressly delegated authority, have the force of law and when not so adopted are invalid, or adjective or interpretive rules, which may be adopted in accordance with this part and under express or implied authority to codify an interpretation of a statute although such interpretation lacks the force of law. The term includes the amendment or repeal of a prior rule but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;

(b) declaratory rulings issued pursuant to 82-4218;

(c) rules relating to the use of public works, facilities, streets, and highways when the substance of such rules is indicated to the public by means of signs or signals;

(d) seasonal rules adopted annually relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of such rules and rules adopted annually relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of such rules is indicated to the public by means of signs or signals;

(e) rules implementing the state personnel classification plan, the state wage and salary plan, or the state-wide budgeting and accounting system;

(f) uniform rules adopted pursuant to interstate compact, except that such rules shall be filed in accordance with 82-4205 and shall be published in the Montana administrative code.

HISTORY: En. § 2, c.2, Ex.L.1971; am. § 2, c. 285, L.1977

3.2 DERIVATION AND PURPOSE

The text was originally derived from § 1(7) of the Revised Model State Act, plus the last four exemptions which were developed locally. McCrory reported that the words "regulation, standard or" were added to the Model Act language

in the first sentence because these terms were often employed in Montana statutes. He also noted that a rule "may be of 'general applicability' even though it is of immediate concern only to a single person or a small groups, provided the form of the rule is general and others who fall within the regulated category in the future will come within its coverage." Study, II, p.4.

The last four exemptions were added "so that it will not be necessary to follow rule-making procedures to establish or change speed limits," because fish, game and recreation area rules "must often be adopted on short notice or under circumstances when it would be impractical to use rule-making procedures," because "it would not be practical to make rules relating to personnel standards, job classifications and salary ranges subject to rule-making procedures," and because such procedures "would be inconsistent with the intent of interstate compacts to develop uniform rules in participating states." Study, II, p.5.

The 1977 amendment added the second sentence in the opening paragraph, deleted an exemption for intra-agency memoranda which had come from the Model Act, and revised the language in (e), in substance deleting a reference to "personnel standards" and adding "the state wide budgeting and accounting system." The Administrative Code Committee said the purpose of this change was to "cover such matters as sick leave, annual leave, health insurance, and compensatory time for all state employees. This affects a group of over 15,000 people who have a legitimate interest in notice and hearing on these policies, and the legislature has a legitimate oversight interest." Report, p.18.

3.3 COMMENTARY

(a) The basic definition is very broad and doubtless takes in categories of agency statements which the agencies do not ordinarily regard as rules. Two examples: An agency may intend a conclusion of law in a contested case decision to serve as a precedent for future similar cases. As such, it would acquire a general applicability and amount to a rule. A federal aid program may be administered through a state agency pursuant to an annually revised state plan approved by the federal grantor. The state plan is a document which interprets and implements both federal law and the state's policy to accept and administer funds under that act of Congress. If state matching funds have been appropriated, state law is also implemented under this plan.

Cooper's State Administrative Law notes that the

breadth of the Revised Model State Act definition "will initially impose a substantial burden upon agencies, but the preponderating public good can well justify the temporary burden." (V.I, p.111) He adds that legislatures may wish to emulate Wisconsin and enact specific exemptions, after several years' experience with the broad definition, for particular programs where the burden of formal rule-making outweighs the benefit. The Wisconsin APA's definition of a rule contains twenty particular exemptions, incidently including decisions and orders in contested cases. (W.S.A. § 227.01)

(b) The 1977 amendment concerning legislative and interpretive rules borrowed the terms from Davis but employed them in a different sense. In Davis' view, interpretive rule-making authority is implied whenever an agency administers a statute, and only legislative rules require some kind of delegated authority, explicit or implicit. Treatise, 1970 Supp., § 5.03. Under Montana law, all rules must derive from delegated authority and implicitly delegated authority is considered legitimate only for interpretive rules.

When this amendment made the filing of interpretive rules optional, it underscored a divergence in agency views of codified rule-making. Some agencies put a lot of material into the administrative code, including interpretations, because they feel that county-level program administrators need such official formality in order to administer a law uniformly across the state, or because constituent groups demand such formality to be sure of consistent administration. These programs are typically decentralized, such as welfare, property assessment, and livestock inspection. Other departments are chary about filing rules and seldom file interpretations. Their programs are likely to be quite centralized, such as utility siting certification and professional licensing. One office, often one person, probably handles all requests for the interpretation of a particular point, and as long as he is consistent, there will be no demand for rule-making on his interpretations.

3.4 CROSS-REFERENCE

Examples of rules for the internal management of an agency are given in 82A-107, R.C.M. 1947, a section of the Executive Reorganization Act.

4. DEFINITIONS - "CONTESTED CASE"

4.1 TEXT R.C.M. 82-4202(3); prop. M.C.A. 2-4-102

"Contested case" means any proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to rate making, price fixing, and licensing.

HISTORY: En. § 2, c.2, Ex.L.1971.

4.2 DERIVATION AND PURPOSE

This is § 1(2) of the Revised Model State Act.

It is, McCrory wrote,

> broadly phrased so as to include all proceedings in which the basic concepts of due process should be applied to protect private rights and the public interest... The definition refers to determinations which are "required by law" to be made after an opportunity for a hearing. This has broader meaning than merely a statutory requirement for an opportunity for hearing. It includes situations where a hearing is required as a matter of constitutional right. Thus, a hearing may be required even though an applicable statute does not provide for one. The words "required by law" have the same broad meaning when used in other sections of the MAPA...The definition is not intended to include informal preliminary inquiries or investigations made to determine if formal "contested case" proceedings should be instituted.
>
> Study, II, pp.5-6

4.3 CONSTRUCTION

(a) Sup. Ct. 1975: When Department of Labor and Industry had adopted Attorney General's model rules of practice, including Model Rule 13's provision that contested case is opportunity for hearing to contest agency's intended action, department was required to afford petitioner under Wage Payment Act a contested case hearing notwithstanding lack of statutory provision for hearing. *Burgess v. Softich, 535 P.2d 178.*

(b) Sup. Ct. 1977: Section 84-1508.1 does not provide for a true adversary hearing but only for presentation of additional evidence by taxpayer and reconsideration by Department of Revenue thereafter; this is not a contested case as contemplated by MAPA. *W. R. Grace & Co. v. Dept. of Revenue*, *Mont.* , 567, P.2d 913.

4.4 COMMENTARY

There is no conflict between the Burgess and Grace decisions if one reads the latter as based on administrative procedures unique to the taxation laws of Montana, where the Department of Revenue may hold informal hearings but the State Tax Appeal Board conducts the true formal hearing and makes the record. See c.155, L.1977, amending various tax statutes to clarify this allocation.

The model rule definition of "contested case" was revised by the Attorney General in December 1977 so that Burgess v. Softich rests upon provisions which are no longer in effect.

5. DEFINITIONS - "LICENSE, LICENSING, PERSON, PARTY"

5.1 TEXT R.C.M. 82-4202; prop. M.C.A. 2-4-102

(4) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or other form of permission required by law but does not include a license required solely for revenue purposes.

(5) "Licensing" includes any agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

(6) "Party" means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(7) "Person" means any individual, partnership, corporation, association, governmental subdivision, or public organization of any character other than an agency.

HISTORY: En. § 2, c.2, Ex.L.1971; am. § 2, c.285, L.1977

5.2 DERIVATION AND PURPOSE

The definitions of "license" and "person" are identical to those in the Revised Model State Act. The definition of "licensing" is also from the Model Act with the addition of the words "limitation" and "renewal", at McCrory's suggestion, Study, II, p.6, and "transfer" at the suggestion of the Administrative Code Committee--the 1977 amendment. These additional terms clarify that any transactions involving a license as a property right under Montana practice are covered. The "solely for revenue purposes" exemption is "intended to exclude from coverage licensing which is purely routine or ministerial in nature." Study, II, p.6.

McCrory also used the Revised Model State Act definition of "party" and continued: "The second phrase, beginning with 'but', has been added to permit agencies to allow interested persons or agencies, who are not sufficiently involved to be parties, to appear where a diversity of viewpoint is desirable in reaching a determination. It is comparable to procedures used by courts in permitting persons to appear as friends of the court." Study, II, p.7.

5.3 CROSS-REFERENCES

As to intervening parties, the Public Service Commission has adopted rules for general and special interventions, ARM 38-2.2(30)-P2310 through P2340. The consequences of the definition of "person" excluding agencies are noted at ¶ 30.4.

6. ORGANIZATIONAL AND PROCEDURAL RULES - PUBLIC INSPECTION

6.1 TEXT R.C.M. 82-4203; prop. M.C.A. 2-4-201, 2-4-103

(1) In addition to other rule-making requirements imposed by law, each agency shall:

(a) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests. The notice and hearing requirements contained in 82-4204 do not apply to the adoption of a rule relating to a description of its organization;

(b) adopt rules of practice, not inconsistent with statutory provisions, setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(c) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(d) upon request of any person or agency, provide a copy of any rule. Unless otherwise provided by statute, an agency may require the payment of the cost of providing such copies.

(2) No agency rule is valid or effective against any person or party whose rights have been substantially prejudiced by an agency's failure to comply with the public inspection requirement herein.

HISTORY: En. § 3, c.2, Ex.L.1971; am. § 1, c.240, L.1974; am. § 3, c.285, L.1977.

6.2 DERIVATION AND PURPOSE

(1)(a), (1)(b), and (1)(d), first sentence, are § 2 of the Revised Model State Act; the remainder is original. The 1974 amendment (An act...removing the requirement of notice and hearing when an agency adopts as a rule a description of its organization) added the second sentence of (1)(a). The 1977 amendment made only non-substantive grammar changes.

Of the original version, McCrory wrote:

> This section...together with (82-4205) and (82-4206) will correct two of the most serious deficiencies which exist in administrative practice in the state, lack of public information concerning the actual procedures and pol-

> icies which should have been followed or have been followed in the past...As a result of the foregoing, most agencies either have no procedural rules or rules which are incomplete and inadequate. Some agencies are operating under the incorrect assumption that they do not have authority to adopt procedural rules. Subsection (1) will eliminate such confusion and insure that each agency adopts adequate procedural rules for the guidance of the public and agency personnel and will have the effect of stabilizing agency procedures.
>
> Study, II, pp.9-10

6.3 COMMENTARY

Litigants occasionally find themselves arguing an issue before an agency which has neither rules nor prior decisions on the subject. Where the standard is public convenience and necessity, it is very difficult to gauge, without such yardsticks, just how much convenience and necessity one must prove or disprove. Whether the difficulty is severe enough to oblige the agency to furnish the parties some decisional criteria has been argued before the State Banking Board and the State Tax Appeal Board in recent years; no answer has yet appeared. In any event, parties to a case in this posture should seek to inspect all the policies, decisions and interpretations they can find in the agency's office.

The public inspection requirement was enacted prior to ratification of the 1972 constitution and its "right-to-know" provision, Article II, section 9. The limitation on that right ("except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure") should be kept in mind when applying this subsection of MAPA.

6.4 CROSS-REFERENCE AND FORMS

The rule describing the organization of a department is always the first rule in its title. The next item is always the rules of procedure. When an agency adopts the Attorney General's model rules (see ¶7), it may incorporate them by reference with a brief statement. Some agencies have written their own procedural rules, however; the Public Service Commission and the Human Rights Commission are notable examples.

While a request for production of documents under Rule 34, M.R.C.P., would be the customary procedure for public inspection when the agency was an adversary, there will be circumstances under which this procedure is not appropriate. Form 1 is a simple letter which can be used to accomplish the same result.

7. ATTORNEY GENERAL'S MODEL RULES

7.1 TEXT R.C.M. 82-4203; prop. M.C.A. 2-4-202

(3) The attorney general shall prepare a model form for a rule describing the organization of agencies and model rules of practice for agencies to use as a guide in fulfilling the requirements of 82-4203(1). The attorney general shall add to, amend, or revise the model rules from time to time as he considers necessary for the proper guidance of agencies. The model rules and additions, amendments, or revisions thereto shall be appropriate for the use of as many agencies as is practicable and shall be filed with the secretary of state and provided to any agency upon request. The adoption by an agency of all or part of the model rules does not relieve the agency from following the rule-making procedures required by this part.

HISTORY: En. § 3, c.2, Ex.L.1971; am. § 3, c.285, L.1977

7.2 DERIVATION AND PURPOSE

McCrory derived this provision from Oregon Statutes § 183.340 "to establish, to the extent possible, uniform procedures among all state agencies, and to provide agencies, which are not manned by persons experienced in administrative procedures and do not have the resources to hire full-time counsel, with proper guidance." Study, I, pp.29-30. The 1977 amendment made only non-substantive style and grammar changes.

7.3 COMMENTARY

Model rules, 35 in all, were drawn up by the Attorney General's office in 1972 and published in the first volume of the Administrative Code. They remained unchanged for several years, through amendments to MAPA and increasing experience. One of the Administrative Code Committee's recommendations to the 1977 legislature was that the Attorney General undertake to update and revise the model rules. The legislature enacted House Joint Resolution 5 to this effect and the Attorney General adopted a complete revision in December 1977.

8. LEGISLATIVE REVIEW OF RULES

8.1 TEXT R.C.M. 82-4203.1; prop. M.C.A. 2-4-412

(1) The legislature may, by joint resolution, repeal any rule in the Montana administrative code. If a rule is repealed, the legislature shall, in the joint resolution, state its objections to the repealed rule. If an agency adopts a new rule to replace the repealed rule, the agency shall adopt the new rule in accordance with the objections stated by the legislature in the joint resolution. If the legislature does not repeal a rule filed with it before the adjournment of that regular session, the rule remains valid.

(2) The legislature may also, by joint resolution, direct a change to be made in any rule in the Montana administrative code or direct the adoption of an additional rule. If a change in any rule or the adoption of an additional rule is directed to be made, the legislature shall, in the joint resolution, state the nature of the change or the additional rule to be made and its reasons therefor. The agency shall, in the manner provided in the Montana Administrative Procedure Act, adopt a new rule in accordance with the legislative direction.

(3) Rules made by agencies and changes in rules directed by the legislature under subsection (2) of this section, shall conform and be pursuant to statutory authority.

HISTORY: En. § 1, c.239, L.1973; am. § 1, c.236, L.1974; am. § 4, c.285, L.1977.

8.2 DERIVATION AND PURPOSE

Original, although a number of states have enacted provisions similar to the repealer procedure in (1). The 1973 legislature, in anticipation of the initial publication of the administrative code later that year, vested a power in the following session only, to repeal any objectionable rule published in the new code by joint resolution. The 1974 session, confronted with the magnitude of the administrative code, made the repealer authority permanent and added the present second and third subsections. This third subsection emphasizes that a joint resolution is not in itself sufficient authority for adopting or amending rules. The 1977 amendment deleted two paragraphs dealing with the transmission of rules from the Secretary of State to the legislature, a mechanical formality of no significance.

8.3 COMMENTARY

(a) Proposals for legislative veto of rules have spawned many separation-of-powers debates when the veto is to be made by a joint resolution or similar vehicle. A joint resolution in Montana is effective when passed in the same form by the House and the Senate; the governor's assent is not necessary. The executive branch in Montana has acquiesced in the propriety of this principle by signing the implementing bills and by accepting the results in the few instances when rules have been thus repealed.

In some other jurisdictions the executive branch has vehemently opposed this concept, usually arguing that if rules have the force and effect of law any legislative action to undo a rule must be done by bill either signed by the chief executive or passed over his veto. The counter-argument is that if a rule became effective without the chief executive's signature, action to nullify the rule should not need that signature.

(b) In any event, the Montana legislature has exercised this power sparingly, and usually to remedy minor problems.

The 1975 special session resolution repealing SRS rules to cut back the medically needy assistance program (HJR 1, Ex.L.1975) was the only instance through 1977 where a major policy decision of a large department, effectuated through rule-making, was vetoed. That resolution, incidentally, was not within the governor's call for a special session but was nonetheless introduced under the legislature's Joint Rule 6-7: "Joint resolutions affecting rules adopted in the Montana Administrative Code may be introduced and transmitted at any time during a session."

8.4 FORMS

The Montana Legislative Council's Bill Drafting Manual (1977 ed.) sets out as Appendices G, H, and I, sample joint resolutions for use under this section.

9. ADMINISTRATIVE CODE COMMITTEE - ESTABLISHMENT, MEETINGS, STAFF

9.1 TEXT R.C.M. 82-4203.2, 82-4203.3, 82-4203.4; prop. M.C.A. 2-4-401

Administrative code committee--appointment and term of members--officers. The administrative code committee consists of four members of the senate and four members of the house of representatives appointed before the 60th legislative day of the regular session in the same manner as standing committees of the respective houses are appointed. A vacancy on the committee occurring when the legislature is not in session shall be filled by the selection of a member of the legislature by the remaining members of the committee. No more than two of the appointees of each house may be members of the same political party. A member of the committee shall serve until his term of office as a legislator ends or until the end of the 60th legislative day of the session of the biennium following his appointment or until his successor is appointed, whichever occurs first. The committee shall elect one of its members as chairman and such other officers as it considers necessary.

Meetings. The committee shall meet as often as may be necessary during and between legislative sessions. Committee members are entitled to receive compensation and expenses as provided in 43-301.1.

Appointment of employees and consultants. The administrative code committee may retain whatever employees, consultants, or counsel as are necessary to carry out the provisions of this part and to advise the publisher in relation to the text and legal authority of the material published in the register or the code, within the limitations of legislative appropriations.

HISTORY: En. §§ 2, 3, 4, c.410, L.1975; am § 6, c.285, L.1977.

9.2 DERIVATION AND PURPOSE

These sections of the 1975 act were modeled after the Legislative Audit Act's sections 79-2304, 2305, and 2308. The 1977 amendment changed "this act" to "this part" in 82-4203.4, and also inserted there the phrase "and to advise the publisher in relation to the text and legal authority of the material published in the register or the code." The publisher is the Secretary of State.

9.3 COMMENTARY

The committee has adopted the custom of electing a vice-chairman; in 1975 and again in 1977 this member was of the same party as the chairman. Many interim committees are required to choose a chairman and a vice-chairman from different parties. The committee's appropriation for the 1977-79 biennium was $41,000, contained within the overall appropriation for the Legislative Council, which provides necessary staff services for the committee.

10. POWERS OF THE COMMITTEE

10.1 TEXT R.C.M. 82-4203.5; prop. M.C.A. 2-4-402, 2-4-403, 2-4-411

(1) The committee shall review all proposed rules filed with the secretary of state and may:

(a) prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule when a rule-making hearing will not be held in accordance with the provisions of 82-4204;

(b) prepare recommendations for the adoption, amendment, or rejection of a rule and submit oral or written testimony at a rule-making hearing;

(c) require that a rule-making hearing be held in accordance with the provisions of 82-4204;

(d) if the legislature is not in session, poll all members of the legislature by mail to determine whether a proposed rule is consistent with the intent of the legislature, provided that the poll shall include an opportunity for the agency to present a written justification for the rule to the members of the legislature; or

(e) should 20 or more legislators object to any rule, the committee shall poll the members of the legislature under subsection (d).

(2) The committee shall prepare a report to the legislature at least once each biennium and may recommend amendments to the Montana Administrative Procedure Act or the repeal, amendment, or adoption of a rule as provided in 82-4203.1.

HISTORY: En. § 5, c.410, L.1975; am. § 7, c.285, L.1977; am. § 1, c.561, L.1977.

10.2 DERIVATION AND PURPOSE

The 1975 act (SB 268), as introduced, would have authorized the committee to suspend the effect of a rule to which it objected until the next legislative session convened; Michigan, Connecticut and several other states have such committees. Amendments to SB 268 suggested by the governor's office transformed the committee into an advisory body with recommending authority under (1)(a) and (1)(b) and with the ability to request a public hearing under (1)(c). C. 285 of 1977 changed this "request" to "require" in (1)(c) to remove any ambiguity in the status of a committee call for a public hearing. C. 561 of 1977 (SB 120) added (1)(d) and (1)(e) in response to the legislature's desire for a more effective check on executive rule-making between sessions. Subsection (2)

is as enacted by the original 1975 act.

10.3 COMMENTARY

(a) The constitutionality of delegating to a joint interim committee authority to temporarily suspend rules appears doubtful in Montana, under the holding of *Judge v. Legislative Finance Committee, Mont. , 543 P.2d 1317 (1975).* Although the legislature could delegate the authority to make interim appropriations changes by budget amendment to an executive branch office, the same power could not be delegated to a portion of the legislature, i.e., the finance committee. If it were argued that the finance committee was an agency distinct from the legislature, then membership on the committee would be another civil office to which legislators cannot be appointed by virtue of Art. V, § 9, of the Montana constitution. The analogy between the power to suspend a rule, even temporarily, and the power to hold up a budget amendment, even temporarily, is evident.

(b) The 1977 amendments strengthened the committee while avoiding these constitutional difficulties, by calling on the entire membership of the legislature to act by mail on objections to a rule. The legal effect of a vote against a rule is set forth in 82-4205(4) and possibly in 82-4219. Under either section the ultimate power to throw out a rule during a legislative interim remains, technically, in the judiciary. It is not clear whether the legislature can formally exercise any plenary power (other than the power to call itself into special session) by mail. However, the practical effect of a vote against a rule is to render it unenforceable. The legislature has thus acquired the substance, while not the form, of interim control over rule-making.

11. BASIC RULE-MAKING PROCEDURE

11.1 TEXT R.C.M. 82-4204; prop. M.C.A. 2-4-302

(1) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(a) give written notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, rationale for the intended action, and the time when, place where, and manner in which interested persons may present their views thereon. The notice shall be filed with the secretary of state for publication in the Montana administrative register as provided in 82-4206(2) and mailed to persons who have made timely requests to the agency for advance notice of its rule-making proceedings. The notice shall be published and mailed at least 30 days in advance of the agency's intended action. If any statute provides for a different method of publication, the affected agency shall comply with the statute in addition to the requirements contained herein. However, in no case may the notice period be less than 30 days or more than 6 months.

(b) afford interested persons at least 20 days' notice of a hearing and 28 days to submit data, views, or arguments, orally or in writing. In the case of substantive rules, opportunity for oral hearing shall be granted if requested by either 10% or 25 of the persons who will be directly affected by the proposed rule, by a governmental subdivision or agency, or by an association having not less than 25 members who will be directly affected. An agency may continue a hearing date for cause. Contested case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise required by statute, nothing herein alters that requirement. The agency shall consider fully written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

HISTORY: En. § 4, c.2, L.1971; am. § 6, c.410, L.1975; am. § 1, c.482, L.1975; am. § 8, c.285, L.1977.

11.2 DERIVATION AND PURPOSE

(a) The original version, McCrory wrote, was derived from § 3(a)(1) and (2) of the Revised Model State Act with alterations in (1)(a) because the Model

Act language was appropriate for newspaper or like publication rather than publication in an official state register such as MAPA later establishes. In (1)(b) he departed from the Model Act at four points:

> First, the alternative ten percent requirement has been added because some state agencies regulate comparatively small groups. This addition...insures that there is not a disparity in treatment between small and large regulated groups.
>
> Second, the parties requesting the hearing must be "directly affected." This has been added to insure that agencies need not go through the trouble and expense of a hearing unless the parties requesting it have a substantial interest in the proceeding.
>
> Third, language has been added which states that rule-making hearings are not subject to contested case procedures.
>
> Fourth, language has been added to insure that where hearings are otherwise required by statute, that requirement will not be changed.
>
> Study, II, p.14

(b) The first 1975 amendment added a paragraph (c) calling for reference of a proposed rule to the Administrative Code Committee following compliance with (a) and (b); this was deleted in 1977 since the committee's functions come into play when notice is filed.

The second 1975 amendment (SB 135, c.482) was sent to the governor as a bill extending the minimum period of notice from 20 days to 30 days. An amendatory veto was accepted which returned the minimum to 20 days and which added a sentence reading, "An interested person may file a written request with the agency to extend a hearing date up to 20 days."

(c) The 1977 amendments added the phrase "rationale for the intended action", changed the minimum notice period from 20 to 30 days, and added a maximum of six months between notice and action in (a). Paragraph (b) was amended to specify a minimum of 20 days' notice of a public hearing and 28 days for the submission of written testimony, revised the sentence allowing agencies to continue hearings into the present version, and changed the last sentence by deleting the words

"if requested to do so by an interested person either prior to adoption or within 30 days thereafter". This last amendment made the statement of reasons mandatory on all rule-making actions. Several of these changes in the Administrative Code Committee's general revision bill had been proposed to the committee by spokesmen for the regulated.

11.3 CONSTRUCTION

Sup. Ct. 1976: When interested parties had alleged numerous detailed deficiencies in testifying on proposed rule for cyclical revaluation of property, Department of Revenue letter to Administrative Code Committee characterizing objections as opposed to property tax in general did not satisfy requirement of full consideration of objections to rule. *Patterson v. State, Dept. of Revenue, et al.,* ___ *Mont.* __, *557 P.2d 798.*

11.4 COMMENTARY

(a) Montana agencies have generally construed the directly-affected test for requesting hearings rather liberally. This is appropriate in view of the quasi-legislative nature of rule-making (no bill before the legislature, regardless of how trivial, passes without a public hearing, and lack of standing is never grounds to bar one from testifying at a legislative committee hearing). And if 25 persons are unhappy with a proposed rule, they will probably complain to the Administrative Code Committee if they are not given a hearing by the agency. The committee can mandate the hearing. However, dicta in Western Bank of Billings v. State Banking Board et al., 570 P.2d 115, suggests that an agency may disregard a petition for a rule-making hearing when the petitioners' interest is not recited.

(b) The Patterson holding seems to elevate the statement of reasons to the status of a document ancillary to the main action, and whose adequacy is reviewable independent of the merits of the main action. The analogy to an environmental impact statement should be carefully noted. A good statement of reasons enhances the constitutional policy in favor of public participation, by demonstrating that the agency was listening to those who participated.

The statement is now published in the rules section of the administrative register when the rule is adopted, amended, or repealed.

11.5 CROSS-REFERENCES AND FORMS

The Attorney General's model rules include a series of forms for notices and a rule for the conduct of a rule-making hearing (model rule 3, sample forms 4-13). Model rule 5 suggests forms for the statement of reasons required upon adoption of a rule.

12. EMERGENCY RULES

12.1 TEXT R.C.M. 82-4204; prop. M.C.A. 2-4-303

(2) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period not longer than 120 days, but the adoption of an identical rule under subsections (1)(a) and (1)(b) of this section is not precluded. The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review.

HISTORY: En. § 4, c.2, Ex.L.1971; am. § 8, c.285, L.1977

12.2 DERIVATION AND PURPOSE

The first two sentences are § 3(b) of the Revised Model State Act. McCrory said the third sentence, derived from Oklahoma law (75 Ok.St. 303(b)) was added "to caution agencies to carefully exercise their power to adopt emergency rules, because adequate notice and opportunity for public participation is not required." Study, v. I, pp. 38-39.

The 1977 amendment changed the verb of the third sentence from "shall be" to "is".

12.3 CONSTRUCTION

(Sup.Ct. 1975): Facts showed adequate emergency when department determined that legislative budget cuts necessitated curtailment of aid to medically needy. *State ex rel. Dept. of S.R.S. v. Cole, 167 Mont. 373, 538 P.2d 1031.*

12.4 COMMENTARY

The outcome of the Cole case was soon changed by the legislature which, in special session August 9, 1975, adopted a joint resolution repealing the SRS emergency rules. The Administrative Code Committee followed with a letter to all state agencies, published in the August 1975 Administrative Register, outlining criteria for establishment of emergency conditions in the state-

ment of reasons. The committee admonished the agencies that if the criteria were not strictly adhered to, amendments restricting agency access to this procedure could be anticipated in the next session. The criteria were that "imminent" be shown as less time than the minimum for regular rulemaking, that "peril" be shown as jeopardy of being irretrievably lost, and that the public be identified as something wider than the agency's own employees or regulated sector.

The admonition was evidently heeded, for a very noticeable drop in the number of emergency rule filings occurred almost immediately. McCrory, in his 1977 Law Review article, noted that in light of the public participation section of the state constitution, "a reviewing court ought to consider whether an agency has acted reasonably if it eliminates completely prior notice or opportunity for public participation. In many situations an agency will have time to give an abbreviated notice which will permit interested persons to have some input in the rule-making process." 38 Mont.L.Rev. 13.

12.5 FORMS

The attorney general's model rule 6 provides a form for abbreviated notice of rulemaking under emergency conditions, as suggested by McCrory.

13. ADDITIONAL RULE-MAKING PROCEDURES

13.1 TEXT R.C.M. 82-4204; prop. M.C.A. 2-4-305, 2-4-304, 2-4-314

(3) No rule is valid unless adopted in substantial compliance with subsections (1) or (2) of this section and within 6 months of the publishing of notice thereof.

(4) An agency may use informal conferences and consultations as a means of obtaining the viewpoints and advice of interested persons with respect to contemplated rule making. An agency may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rule making. The powers of the committees shall be advisory only. Nothing herein shall relieve the agency from following rule-making procedures required by this part.

(5) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference shall clearly indicate that portion of the language which is statutory and the portion which is amplification of the language. Each rule shall include a citation of authority pursuant to which it, or any part thereof, is adopted.

(6) Each agency shall at least annually review its rules to determine if any new rule should be adopted or any existing rule should be modified or repealed.

HISTORY: En. § 4, c.2, Ex.L.1971; am. § 8, c.285, L.1977.

13.2 DERIVATION AND PURPOSE

(a) McCrory drafted (3) in a form quite different from that which became law in 1971. The first bill to enact MAPA, Senate Bill 21, contained an additional sentence providing that a rule's adoption could be challenged on the grounds of not complying with MAPA requirements only during the first two years following adoption. This was the bill which Gov. Anderson vetoed, saying it gave "sweeping powers" to the governor, which powers could be abused. Senate Journal, 1st Ex. Sess. 1971, p. 22. One of the changes made in the redraft then introduced in the special session was that the two-year limitation on technical challenges was dropped.

The 1977 amendment made three changes in this subsection, turning a conjunctive into a disjunctive (even substantial compliance with both subsection (1) and subsection (2) at the same time is impos-

sible), and adding the six-month limitation to insure that a stale and forgotten notice could not be relied on to justify a rule adopted much later.

(b) McCrory borrowed (4)'s language from Wisconsin's APA (W.S.A. § 227.018) "to make it clear that the useful techniques described therein may be employed in the rule-making process, in addition to the formal requirements. The Wisconsin act also furnished the words for (5), "to insure that agency rules will not merely restate statutory language." The last subsection is apparently original and "responds to the study's finding that many agencies have gone for long periods without reviewing rules or making needed changes in them." Study, I, pp. 39-40.

14. AUTHORITY FOR RULES

14.1 TEXT R.C.M. 82-4204.1; prop. M.C.A. 2-4-301, 2-4-305

(1) Except as provided in 82-4203, nothing in this part confers authority upon or augments the authority of any state agency to adopt, administer, or enforce any rule. To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

(2) Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, no rule adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

HISTORY: En. § 9, c. 285, L.1977.

14.2 DERIVATION AND PURPOSE

These provisions were taken from the California Government Code, §§ 11373, 11374, because the Administrative Code Committee had noted a widespread misunderstanding that MAPA itself was the substantive authority for all the rules being made. Report, p.7.

14.3 COMMENTARY

While the beginning of subsection (2) appears to sanction the idea that rule-making authority may be implicitly delegated in a statute, the definition of rule back in 82-4202 (¶2) makes it clear that implied authority supports only the adoption of interpretive rules. Legislative rules must be based on an express delegation.

Once authority is established for whatever type of rule, the requirements of consistency, lack of conflict, and reasonable necessity come into play. The California provisions were enacted in 19 and have been construed by the California courts on a number of occasions.

While the Montana Supreme Court has not yet construed or applied the statutory standard, it has begun to examine specific rules for consistency with the authorizing statute. Rules were invalidated in *State ex rel Swart v. Casne et al., 34 St.Rep. 394, 564 P.2d 983 (1977)*, and rules were upheld in *Garsjo v. Dept. of Labor and Industry, 34 St.Rep. , 562 P.2d 473 (1977)*

15. FILING OF RULES - EFFECTIVE DATE OF RULES

15.1 TEXT R.C.M. 82-4205; prop. M.C.A. 2-4-306, 2-4-404

(1) Each agency shall file with the secretary of state a copy of each rule adopted by it. Each rule shall become effective after publication in the Montana administrative register as provided in 82-4206, except that:

(a) if a later date is required by statute or specified in the rule, the later date shall be the effective date;

(b) subject to applicable constitutional or statutory provisions, an emergency rule shall become effective immediately upon filing with the secretary of state or at a stated date following publication in the Montana administrative register if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to every person who may be affected by them.

(2) The secretary of state may prescribe a format, style, and arrangement for rules which are filed pursuant to this part and may refuse to accept the filing of any rule that is not in compliance therewith. He shall keep and maintain a permanent register of all rules filed (including superseded and repealed rules), which shall be open to public inspection, and shall provide copies of any rule upon request of any person or agency. Unless otherwise provided by statute, the secretary of state may require the payment of the cost of providing such copies.

(3) In the event that the administrative code committee has conducted a poll of the legislature in accordance with 82-4203.5, the results of the poll shall be published with the rule, and shall be admissible in any court proceeding involving the validity of the rule. In the event that the poll determines that a majority of the members of both houses find the proposed rule is contrary to the intent of the legislature, the rule shall be conclusively presumed to be contrary to the legislative intent in any court proceeding involving its validity.

HISTORY: En. § 5, c.2, Ex.L.1971; am. §10, c.285, L.1977; am. § 2, C.561, L.1977.

15.2 DERIVATION AND PURPOSE

This section originally began with a subsection requiring all covered agencies to file such of their rules in effect December 31, 1972 which they wished to keep effective, with the Secretary of State by March 2, 1973. Any then-existing rules not so filed were "deemed to have been abrogated by the agency" and voided. The 1977 amendment deleted this provision as a temporary matter.

The present subsection (1) came from the Revised Model State Act, § 4, with one change: rules were to take effect ten days after publication. "Basic principles of fairness," McCrory argued, "dictate that individuals should not be required to comply with a rule until a reasonable attempt has been made to give notice of its existence." Study, II, p.16. The Administrative Code Committee's bill, which had added an additional ten days to the notice period in 82-4204, dropped this ten day waiting period as it appeared to be of no real benefit.

McCrory devised the present subsection (2) to assist the Secretary of State, pointing out that any "inconvenience to particular agencies will be relatively slight in comparison to the inconvenience to the Secretary of State caused by a lack of uniformity." Study, II, p.17.

Subsection (3) was enacted by SB 120 as part of the 1977 legislature's effort to gain more of a voice in delegated policy-making. (See 82-4203.5 and discussions at ¶9.)

15.3 COMMENTARY

The normal effective date, "after" publication in the register, means the day following the stated publication date. The Secretary of State's format rules (which are published in the front of volume I of the Administrative Rules of Montana) specify this point.

Subsection (3) does not indicate what a court is to do after it receives a poll of legislators showing a rule to be contrary to their intent. Reference should be made to the "reasonably necessary" test in 82-4204.1 (the rule must be reasonably necessary to effectuate the purpose of the statute) and to the proceeding for declaratory judgments on the validity of rules provided under 82-4219.

16. PUBLICATION OF ADMINISTRATIVE RULES OF MONTANA, AND MONTANA ADMINISTRATIVE REGISTER

16.1 TEXT R.C.M. 82-4206; prop. M.C.A. 2-4-311, 2-4-312, 2-4-307

(1) The secretary of state shall compile, index, arrange, rearrange, correct errors or inconsistencies without changing the meaning, intent, or effect of any rule, and publish all rules filed pursuant to this part in a publication which shall be known as the administrative rules of Montana (herein referred to as the code). However, this does not require the republication of rules which have been published under the name "Montana Administrative Code". The secretary of state shall supplement, revise, and publish the code, or any part thereof, as often as he considers necessary. He may include such editorial notes, cross-references, and other matter as he and the administrative code committee consider desirable or advantageous. He shall publish supplements to the code at such times and in such form as he considers appropriate.

(2) The secretary of state shall each month or at more frequent intervals compile and publish the Montana administrative register (herein referred to as the register). The register shall contain three sections, a rules section, a notice section, and an interpretation section.

(a) The rules section of the register shall contain all rules filed since the compilation and publication of the preceding issue of the register together with the concise statement of reasons required under 82-4204(1)(b).

(b) The notice section of the register shall contain all rule-making notices filed with the secretary of state pursuant to 82-4204 since the compilation and publication of the preceding register.

(c) The interpretation section of the register shall contain all opinions of the attorney general and all declaratory rulings of agencies issued since the publication of the preceding register.

(d) Each issue of the register shall contain the issue number and date of the register and a table of contents. Each page of the register shall contain the issue number and date of the register of which it is a part. The secretary of state may include with the register information to help the user in relating the register to the Montana administrative code.

(3) The secretary of state, with the consent of the adopting agency, may omit from the code or register any rule the publication of which would be unduly cumbersome,

expensive, or otherwise inexpedient, if the rule merely incorporates by reference a model code, federal agency rule, or like publication made available on application to the agency and if the code or register contains a notice stating the citation and general subject matter of the omitted rule and stating how a copy may be obtained.

HISTORY: En. § 6, c.2, Ex.L.1971; am. § 11, c.285, L.1977.

16.2 DERIVATION AND PURPOSE

(a) Subsection (3) was originally taken from section 5(c) of the Revised Model State Act, while (1) and (2) were devised by McCrory from a number of other state APA's. As to the need for central publication, he wrote in 1970:

> At the present time there is no means of providing statewide notice of the existence or content of administrative rules...The rules of some agencies can be seen only by examining the minutes of their meetings...The published rules for some agencies are out of print and unavailable or are not current because they do not contain amendments.
>
> Study, II, pp. 20-21

McCrory's 1971 version specified explicit publication details; a set of loose-leaf volumes called the Montana Administrative Code was to be published, and the Secretary of State once a month would publish a packet of sheets called the Administrative Register, containing both notices of proposed rulemaking and replacement pages for the insertion of just-adopted rule changes into the Code. The Administrative Code Committee found in 1976 that this system "requires extremely meticulous updating each month or the accuracy of the text is lost." Report, p.13. The committee also stated that the code "is essentially a library resource, but the Register should be available to a wider audience," ibid., and recommended that the two be published separately rather than as an integrated publication.

(b) The committee's 1977 bill added the authority in (1) to arrange, rearrange, and correct errors in rules, changed the name of the code to "Administrative Rules of Montana" (to avoid confusion between the MAC acronym and the MCA abbreviation for

the prospective recodification of the statutes), and added the last two sentences. Subsection (2) was completely rewritten to allow register publication more often than once a month (see subsection (9) of this section), to delete the requirements of code-compatible loose-leaf publication, to add publication of the statement of reasons in the rules section, and to add the interpretations section. Incorporation by reference under (3) was restricted; rather than permitting this practice if the agency had the rule in printed form and made it available, reference citation was limited to federal rules, model codes, and "like" publications.

16.3 CONSTRUCTION

"Model code, federal agency rule, or 'like' publication" (Sec.State 1977): rules of Department of Administration were distinguishable from federal rules, model codes, etc., in that the latter did not originate in Montana. Decl.Rul., 1977 Mont.Adm.Reg. 564.

16.4 COMMENTARY

(a) While (1) appears to contemplate that the Secretary of State compile a general index for the entire code of rules, his office has been obliged to delegate the task of indexing to the various agencies. Each of these prepares an index to its own title or chapter of rules which is published at the end of that title or chapter. The researcher must consequently know which agency regulates an area before he searches for the relevant administrative rules.

(b) Incorporation by reference can get sticky when an agency seeks to incorporate future changes in federal regulations, e.g., "the standards in 45 CFR Part 120, or that part as it may be amended." Subsuming changing federal policies within a state rule without giving state notice of the changes can be a questionable form of reverse delegation. If Congress leaves the states some discretion as how they will accept or fashion the details of a federal-aid program, the state agency should give notice and solicit comments on changes. But if all discretion lies with the federal agency, state hearings are obviously pointless.

17. DISTRIBUTION OF RULES AND REGISTER

17.1 TEXT R.C.M. 82-4206; prop. M.C.A. 2-4-311, 2-4-313

(4) The code shall be arranged, indexed, and printed or duplicated in such manner as to permit separate publication of portions thereof relating to individual agencies. An agency may make arrangements with the secretary of state for the printing of as many copies of such separate publications as it may require. The cost of any such separate publications shall be paid by the agency.

(5) The secretary of state shall distribute copies of the code and supplements or revisions thereto without charge to the following:

(a) attorney general, one copy;

(b) clerk of each court of record of this state, one copy;

(c) clerk of United States district court for the district of Montana, one copy;

(d) clerk of United States court of appeals for the ninth circuit, one copy;

(e) each county clerk of this state, for use of county officials and the public, one copy, which may be maintained in a public library in the county seat or in the county offices;

(f) state law library, one copy;

(g) state historical society, one copy;

(h) each unit of the Montana university system, one copy;

(i) law library of the university of Montana, one copy;

(j) legislative council, three copies;

(k) library of congress, one copy;

(l) state library, one copy.

(6) The secretary of state, clerk of each court of record in the state, clerk of each county in the state, and the librarians for the state law library and the university of Montana law library shall maintain a complete, current set of the code, including supplements or revisions thereto. Such persons shall also maintain the register issues published during the preceding 2 years. The secretary of state shall also maintain a permanent set of the register.

(7) The secretary of state shall make copies of and subscriptions to the code and supplements or revisions thereto and the register available to any person at prices fixed to cover publication and mailing costs.

HISTORY: En. § 6, c.2, L.1971; am. § 11, c.285, L.1977.

17.2 DERIVATION AND PURPOSE

Essentially original; (7) is derived from § 5(c) of the Revised Model State Act. McCrory's notes explain that the public officers listed in (6) were required to preserve rule-making notices for two years because this was the time limit he proposed for allowing challenges to rules on the basis of irregularities in adoption procedures. Study, II, 21. The latter proposal was taken out of the bill in 1971 (cf. ¶13.2(a)) but the two-year retention period has remained here.

The Administrative Code Committee's 1977 amendments revised the free distribution list in (5) by allowing the clerk and recorder's set to be kept in a public library, by deleting authority for the state law and law school libraries to establish exchange agreements with their counterparts in other states, and by adding the state library.

18. FEES AND CHARGES

18.1 TEXT R.C.M. 82-4206; prop. M.C.A. 2-4-313, 2-4-312

(8) The secretary of state shall determine the cost of supplying copies of the code and supplements or revisions thereto and the register. Such cost shall be the approximate cost of printing or duplication and mailing. However, a uniform price per page or group of pages may be established without regard to differences in cost of printing different parts of the code and supplements or revisions thereto and the register.

(9) The secretary of state shall publish all notices, rules, and interpretations filed with him, at least once a month or as directed by the administrative code committee but not more often than twice a month, in a publication called the Montana administrative code register. He shall send the register without charge to each person listed in 82-4206(5) and to each member of the legislature requesting the same. He shall send the register to any other person who pays a subscription fee which he shall fix in consultation with the administrative code committee.

(10) The secretary of state shall deposit all fees he collects in the general fund.

(11) The secretary of state may charge agencies a filing fee for all material to be published in the code or register based on an estimated cost of printing, which he shall fix in consultation with the administrative code committee.

HISTORY: En. § 6, c.2, Ex.L.1971; am. § 11, c.285, L.1977.

18.2 DERIVATION AND PURPOSE

Original; subsections (9) and (11) were enacted in 1977 while (10) is a renumbered subsection of the original act of 1971. Through an error of legislative drafting, the provisions of (9) are somewhat at odds with subsection (2) of the same section in terms of the title and frequency of publication of the register. The controlling provisions have been treated as (2) for the title, Montana Administrative Register, and (9) for the frequency.

18.3 COMMENTARY

For the first twelve months under the 1977 amendment, from July 1977 to June 1978, the Register is scheduled to remain a monthly publication and thereafter to appear on a bimonthly basis.

19. PETITION FOR ADOPTION OF RULES

19.1 TEXT R.C.M. 82-4207; prop. M.C.A. 2-4-315

An interested person or, when the legislature is not in session, a member of the legislature on behalf of an interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 60 days after submission of a petition, the agency shall either deny the petition in writing (stating its reasons for the denial) or shall initiate rule-making proceedings in accordance with 82-4204.

HISTORY: En. § 7, c.2, Ex.L.1971; am. § 2, c.236, L.1974; am. § 12, L.1977

19.2 DERIVATION AND PURPOSE

McCrory followed § 6 of the Revised Model State Act for the original text, changing its 30-day response period to 60 days. The rationale was that "public participation in the rule-making process is desirable," Study, II, p.22. The 1974 amendment inserted the phrase "or, when the legislature is not in session, a member of the legislature on behalf of an interested person"; this was the rest of SB 568, "An act...to provide procedures for legislative review of rules," which also amended 82-4203.1(¶8.2). The 1977 amendment made only non-substantive grammar changes.

19.3 COMMENTARY

Although a court could order an agency to furnish the written statement of reasons to a rejected petitioner, the merits of an agency's decision in this quasi-legislative capacity are immune from judicial review. The rejected petitioner's remedy lies with the next session of the legislature.

When an agency is disposed to act favorably on a petition, the question sometimes arises as to whether the rule change must be noticed exactly as petitioned for. Conforming changes in other rules may be needed, or the agency may simply wish to modify the substance of the proposal. The agency's options would seem to be (a) to notice the change as petitioned and include in the issues section of the notice a statement of other changes it will consider, or (b) to use the notice

itself as a statement denying the petition in part and granting it in part, then proposing its own version of the change.

19.4 CROSS-REFERENCE AND FORMS

As for the procedural rule, most agencies have adopted the attorney general's model rule 2. This rule allows petitioning legislators to state the interests of their constituents in general or specific terms. Form 2 in the appendix is taken from a successful petition filed by a state senator in 1976.

20. JUDICIAL NOTICE OF RULES

20.1 TEXT R.C.M. 82-4208; prop. M.C.A. 2-4-505

Judicial notice of rules. The courts shall take judicial notice of any rule filed and published under the provisions of this part.

HISTORY: En. § 8, c.2, Ex.L.1971; am. c.285, L.1977.

20.2 DERIVATION AND PURPOSE

Original. McCrory, citing cases at 96 Mont. 204, 102 Mont. 455, and 101 Mont. 366, stated that the Montana Supreme Court has sometimes declined to take judicial notice of administrative rules. "In view of the filing and publication requirements in MAPA," he said, this section, "which will eliminate the necessity for submitting proof as to the existence and authenticity of rules, is warranted." Study, II, p. 23. The 1977 amendment changed "this act" to "this part".

20.3 CROSS-REFERENCE

The Supreme Court, in promulgating the Montana Rules of Evidence, accepted the principle of this section in Rule 202(b)(3).

21. NOTICE OF CONTESTED CASE--HEARING

21.1 TEXT R.C.M. 82-4209; prop. M.C.A. 2-4-601, 2-4-612, 2-4-603

(1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(2) The notice shall include:

(a) A statement of the time, place and nature of the hearing.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

(3) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(4) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

HISTORY: En. § 9, c.2, Ex.L.1971.

21.2 DERIVATION AND PURPOSE

These are taken from corresponding subsections of § 9 of the Revised Model State Act, without change. Of the "reasonable" notice requirement in (1) McCrory wrote "(w)hat may be reasonable notice of hearing for one agency may be insufficient or unnecessarily long for another. Accordingly, a uniform notice period is not established." Study, II, p.25.

21.3 CONSTRUCTION

A. "Statement of the matters asserted" (Sup.Ct.1975): party who understood applicant's request for rate increases beyond amount specified in notice, and who contested such additional increases at hearing, cannot contend he was prejudiced by defective notice. *Mont. Consumer Counsel v. P.S.C. and Mont. Power Co., 168 Mont. 180, 541 P.2d 770.*

B. (Sup.Ct. 1977): At no time during proceedings claimed by agency to be contested case under MAPA did agency comply with notice requirement of 82-4209. *State ex rel. Stowe v. Board of Administration, 34 St.Rep. 349, 564 P.2d 167.*

21.4 COMMENTARY

An investigation, application, or other interaction between a person and an agency may, after a period of gestation, become a contested case at a precise moment when some particular action is taken. That action may be the issuance of notice, but sometimes notice issues well before or after a matter reaches contested case status. The time of notice marks the beginning of the ban on ex parte communications and satisfaction of the notice requirement of the public participation statute. Other actions which may mark the beginning of a contested case are the appointment of a hearing examiner (as for the Dept. of Professional and Occupational Licensing) or the exhaustion of informal conciliation processes and application by one party for a formal hearing (as in classification cases before the Board of Personnel Appeals or discrimination complaints before the Human Rights Commission).

To whom notice should be sent can be a troublesome determination, especially in cases involving application for a license or permit. The applicant doesn't need notice or a hearing if his application is granted. MAPA does not and could not require an agency to respond to every such application with notice to the world at large. Most forms of governmental permission involve matters as mundane as a driver's license. Yet, applications for permission to open a bank, or a tavern, or an electric generating plant do trigger widespread contested case notice, since the new activity can often impact neighbors or competitors. Such notice is issued under the terms of the specific statutes regulating those areas. Between the driver's license and the electric plant certificate lies a gray area of agency action, where an extension of governmental permission usually does not, but sometimes may, aggrieve another person to the extent of seeking a hearing. This gray area once covered much of the granting of permits with an environmental aspect, but the environmental impact statement procedure now provides more than adequate notice.

21.5 CROSS-REFERENCES AND FORMS

Notice requirements under the public participation statute appear at 82-4228; under the Montana Environmental Policy Act, distribution criteria for environ-

mental impact statements are in the procedural rules of each department having relevant programs (e.g., for Health and Environmental Sciences, see ARM p. 16-20.C). The form for contested case notice under MAPA is set forth in the Attorney General's model rule 8 and form 14 in the appendix. Form 15 is a sample motion for a more definite statement. Form 18 is a sample consent order issued under this informal disposition authority. See Attorney General's model rule 10, Professional and Occupational Licensing form 4-A(3) (ARM p. 40-46) for the form of default orders.

22. RECORD IN CONTESTED CASE

22.1 TEXT R.C.M. 82-4209; prop. M.C.A. 2-4-614, 2-4-623

(5) The record in a contested case shall include:

(a) All pleadings, motions, intermediate rulings.

(b) All evidence received or considered, including a stenographic record of oral proceedings when demanded by a party.

(c) A statement of matters officially noticed.

(d) Questions and offers of proof, objections, and rulings thereon.

(e) Proposed findings and exceptions.

(f) Any decision, opinion or report by the hearing examiner or agency member presiding at the hearing.

(g) All staff memoranda or data submitted to the hearing examiner or members of the agency as evidence in connection with their consideration of the case.

(6) The stenographic record of oral proceedings or any part thereof shall be transcribed on request of any party. Unless otherwise provided by statute, the cost of the transcription shall be paid by the requesting party.

(7) Findings of facts shall be based exclusively on the evidence and on matters officially noticed.

HISTORY: En. § 9, c.2, Ex.L.1977.

22.2 DERIVATION AND PURPOSE

This is § 9 of the Revised Model State Act, subsections (e) through (g), with three changes made by McCrory. He added the references to a stenographic record of oral proceedings in (5)(b) and (6) "so that agencies will be fully aware of this requirement with regard to oral proceedings." The further provision in (6) that the requesting party pay for the transcript was also added by McCrory. Finally, he inserted the words "as evidence" to the staff memoranda provision in (5)(g), in order "to exclude staff legal memoranda prepared for the decision makers." Study, I, p.62. In thus limiting the staff memo provision, McCrory differed with the Commissioners on Uniform State Laws, who thought the provision, covering all such memos, was of "especial significance" and in some cases should even allow adverse parties to offer evidence in reply. McCrory stressed the importance of the record "because it alone

is the basis for the agency's findings of fact and it is also the record for judicial review under (82-4216)." Study, I, p. 60. "Due process," he added, "requires that the decision makers' findings of fact be based exclusively upon the hearing record. Parties must be afforded an opportunity to respond to all evidence which may be considered and relied upon by the agency." Ibid.

22.3 CONSTRUCTION

"Stenographic record shall be transcribed" (Sup.Ct.1976): District court order that agency furnish transcript rather than tape recording on petition for judicial review was valid and did not determine which party would ultimately pay for transcript. *State ex rel. Board of Personnel Appeals v. District Court*, ___ Mont. ___, *556 P.2d 1238.*

23. RULES OF EVIDENCE

23.1 TEXT R.C.M. 82-4210; prop. M.C.A. 2-4-612

(1) Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence. Objections to evidentiary offers may be made and shall be noted in the record. When a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(3) A party shall have the right to conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence.

HISTORY: En. § 10, c.2, Ex.L.1971.

23.2 DERIVATION AND PURPOSE

McCrory's notes are not helpful for studying the first subsection, because the 1971 legislature rejected his proposal and decided to stick with the common law and statutory rules of evidence. He had submitted a variation on the Revised Model State Act which would have allowed agencies not to be bound by the common law or statutory rules of evidence, and to "admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, or unduly repetitious evidence." This language was in the bill vetoed by Gov. Anderson; in the special session it was changed to the present version.

The second and third subsections are from § 10 of the Revised Model State Act with language added to (3) to "more clearly state that parties have a right to conduct cross-examination and to insure that an agency does not receive evidence in documentary form which is not subject to cross-examination." Study, II, p.28.

23.3 COMMENTARY

A few statutes have been drafted to take advantage of the outlet in the first sentence of (1), by exempting contested case hearings from the rules of evidence. Under the Water Use Act, the common law and statutory rules of evidence shall apply only upon stipulation of all parties to the proceeding, while under the Major Facility Siting Act, the formal rules need not apply if the Board of Natural Resources makes its own rules to exclude repetitive, redundant, or irrelevant testimony. The Board of Personnel Appeals is not bound by statutory or common law rules of evidence. The State Tax Appeal Board is not bound by the rules of evidence in hearing cases appealed from county tax appeal boards. The practice in these agencies seems to be to more or less follow the rules of evidence, relaxing their strictures when to do so helps a hearing move along.

24. OFFICIAL NOTICE

24.1 TEXT R.C.M. 82-4210; prop. M.C.A. 2-4-612

(4) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

HISTORY: En. § 10, c.2, Ex.L.1971.

24.2 DERIVATION AND PURPOSE

This is identical to subsection (4) of § 10 of the Revised Model State Act. Neither McCrory nor the Commissioners on Uniform State Laws offer any explanation of the provision.

24.3 COMMENTARY

To look at the record in a representative sample of contested cases in Montana, one would conclude that state agencies seldom take official notice of anything. Professor Davis feels that specialized administrative agencies take notice of conditions in the industries they regulate as an everyday occurrence. He is critical of the Model Act wherever it might discourage agencies from taking official notice; here, he says:

> The draftsmen of § 10(4) have apparently hidden behind their two words "or otherwise" the difficult problem of what an agency should do when it is noticing facts at the time it is preparing its final decision; whether the words "or otherwise" will allow the agency merely to put the noticed facts into the final report, even if they are disputable, the draftsmen do not even try to answer.
>
> Ad.Law Treatise, 1970 Supp., § 1.04-6.

24.4 FORMS

Forms 9 and 10 in the appendix suggest models for taking and contesting official notice.

25. HEARING EXAMINERS -- DISQUALIFICATION

25.1 TEXT R.C.M. 82-4211; prop. M.C.A. 2-4-611

(1) An agency shall have authority to appoint hearing examiners for the conduct of hearings in contested cases.

(2) Agency members or hearing examiners presiding over hearings shall be authorized to administer oaths or affirmations; issue subpoenas pursuant to section 20 (82-4220) of this act; provide for the taking of testimony by deposition; regulate the course of hearings, including setting the time and place for continued hearings and fixing the time for filing of briefs or other documents; and direct parties to appear and confer to consider simplification of the issues by consent of the parties. All testimony shall be given under oath or affirmation.

(3) A hearing examiner or agency member may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a hearing examiner or agency member, the agency shall determine the matter as a part of the record and decision in the case.

HISTORY: En. § 11, c.2, Ex.L.1971.

25.2 DERIVATION AND PURPOSE

McCrory devised this section as original material, deriving (2) from a bill which had been introduced in the New York legislature. While the authorities granted in (1) and (2) could be inferred from the provisions of the Revised Model State Act, he stated that they should be spelled out for the proper guidance of agencies. He also noted that testimony is to be given under oath or affirmation "because of the importance of the record and for purposes of judicial review." Study, I, p. 69.

Subsection (3), as drafted by McCrory and enacted in the bill vetoed by Gov. Anderson, was far more severe and complex than the present version, which first appeared in the bill reintroduced following the veto. The differences indicate that McCrory's disqualification formula may have been a significant factor in the veto (Anderson objected to the bill's vesting "sweeping powers" in the office of governor, and of the four changes between the vetoed bill and the reintroduced bill, this was the only section granting a power to the governor). The original language was as follows:

(3) A hearing examiner or agency member shall withdraw from any contested case in which he cannot give fair and impartial consideration. Any party may request the disqualification of a hearing examiner or agency member on the ground of his inability to give a fair and impartial hearing or consideration by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which disqualification is claimed. The issue shall be determined promptly. If the charge is against the hearing examiner, the issue of disqualification shall be determined by the agency. If it is against a member of the agency, it shall be decided by the remaining members of the agency. If it affects all or a majority of the members of an agency, the issue shall be determined, upon petition filed by the agency, by the district court where the hearing is being held, if the hearing is in progress, or if the hearing is not in progress, by the district court where the agency has its principal office. Upon the entry of an order for disqualification affecting a hearing examiner, the agency shall assign another in his stead or shall conduct the hearing itself. Upon the disqualification of a member of an agency, the governor shall immediately appoint a member pro tem to sit in place of the disqualified member of that agency.

25.3 COMMENTARY

While the multi-member agencies with full-time members (Public Service Commission, State Tax Appeal Board) seldom if ever appoint hearing examiners, the practice is customary for the boards composed of part-time citizen members; for the boards of the Department of Professional and Occupational Licensing, it is required by statute.

The changes made to (3) indicate that a disqualification decision is committed to the agency's discretion and is subject to judicial review only as it may be an error tainting the final decision in the case. See *Withrow v. Larkin, 421 U.S. 35 (1975)*, for a discussion of constitutional standards for an unbiased hearing before a state administrative agency.

25.4 CROSS-REFERENCES AND FORMS

The Attorney General's model rule 14 prescribes an agency form for the appointment of hearing examiners, as do the procedural rules of the Dept. of Professional and Occupational Licensing. (ARM p.40-48) In disqualification issues the code of ethics enacted by the 1977 legislature may furnish some guidance where a possible conflict of interest may be pecuniary.

Form 22 is a checklist for hearing examiners, originally prepared for licensing cases where the agency is the moving party. A number of agencies utilize the pre-hearing conference regularly; one of its advantages is that it tends to reduce the need for the more formal discovery procedures. Forms 5 and 6 are samples of a notice for a pre-hearing conference and an order following such a conference. Form 12 is a sample affidavit and motion for disqualification.

26. PROPOSED ORDERS

26.1 TEXT R.C.M. 82-4212; prop. M.C.A. 2-4-621, 2-4-622

When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing unless he becomes unavailable to the agency. If the person who conducted the hearing becomes unavailable to the agency, proposed findings of fact may be prepared by a person who has read the record only if the demeanor of witnesses is considered immaterial by all parties. The parties may waive compliance with this section by written stipulation.

HISTORY: En. § 12, c.2, Ex.L.1971; am. § 14, c.285, L.1977.

26.2 DERIVATION AND PURPOSE

This was originally § 11 of the Revised Model State Act. According to the Commissioners on Uniform State Laws, the thrust is "to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record, or at the very least receiving briefs and hearing oral argument. It is intended to preclude 'signing on the dotted line'."

The 1977 amendment struck the option of having the proposed decision drafted by one who had read the record and substituted the phrase beginning "unless he becomes available" and the following sentence. This was proposed by the Administrative Code Committee because a hearing examiner appointed by the Board of Natural Resources and Conservation had been barred, by stipulation of all parties, from drafting the proposed decision--which led, in the view of several participants, to the examiner's loss of the necessary leverage to exclude irrelevant evidence. Report, 19. The language is as proposed in Davis' critique of the Model Act, Ad.Law Treatise, 1970 Supp., § 1.04-6.

26.3 CROSS-REFERENCES AND FORMS

The Attorney General's model rule 19 specifies that the party benefiting by the proposed decision may argue in support of it when the adverse parties argue their exceptions. Form 11 in the appendix is a statement of exceptions.

27. FINAL ORDERS -- FORM AND NOTIFICATION

27.1 TEXT R.C.M. 82-4213; prop. M.C.A. 2-4-623

(1) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record. Each conclusion of law shall be supported by authority or by a reasoned opinion.

(2) Each agency shall index and make available for public inspection all final decisions and orders, including declaratory rulings inder 82-4218. No such agency decision or order is valid or effective against any person or party nor may it be invoked by the agency for any purpose until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof or when a state statute or federal statute or regulation prohibits public disclosure of the contents of a decision or order.

HISTORY: En. § 13, Ex.L.1971; am. § 15, c.285, L.1977.

27.2 DERIVATION AND PURPOSE

Except for the last sentence in subsection (1), added by the 1977 amendment, this material is § 12 of the Revised Model State Act. A note to the Model Act by the Commissioners on Uniform State Laws says "(a)n attempt is made here to require agency findings to go beyond a mere statement of a general conclusion in the statutory language (e.g., that 'public interest, convenience and necessity' will be served) or in language of similar generality. The intent is to require the degree of explicitness imposed by such decisions as Saginaw Broadcasting Co. v. F.C.C., 96 F.2d 554 (D.C.Cir.1938) where the court required a statement of the 'basic or underlying facts'." Adherence to this provision, McCrory wrote, "should refine the reasoning process employed by agencies, resulting in better decisions. In addition, decisions in the form required will provide a better basis for judicial review." Study, II, p. 31.

The Administrative Code Committee proposed the last sentence in (1), "to emphasize a policy in favor of carefully reasoned decisions by agencies." Report, p.19. The language was suggested by Davis in his critique of the Model Act in 1970.

27.3 CONSTRUCTION

A. Sup.Ct. 1977: Letter from agency to plaintiff did not comply with 82-4213 where it contained no findings of fact, just the final conclusion that the board had ruled against plaintiff. *State ex rel. Stowe v. Bd. of Administration, 34 St.Rep. 349, 564 P.2d 167.*

B. "a ruling on each proposed finding" (Sup.Ct.1975): This does not require a separate express ruling on each proposed finding of a party, as long as the agency's decision and order on such proposed findings are clear. *Mont. Consumer Counsel v. P.S.C. and M.P.Co., 168 Mont. 180, 541 P.2d 770.*

27.4 COMMENTARY

The third and fourth sentences of (1) seem to cause the most difficulty for decision-writers in Montana. As to rulings on proposed findings, Cooper writes:

> The most practical way yet devised of assuring that the agency will make a specific finding on every issue of basic fact relevant to the ultimate question on which the agency must pass, is to delegate to the adverse parties the responsibility of stating the issues of basic fact which the agency must resolve. This, of course, is a responsibility which the adverse parties are happy to assume.
>
> State Administrative Law, II, p.478

The Court's holding in the Consumer Counsel case weakens this process by adding another subjective factor on judicial review: whether the agency's reasoning in rejecting a proposed finding, if not explicit, can be "clearly" inferred.

As to the concise and explicit statement of underlying facts, Cooper explains:

> The prime purpose of this provision is to require agencies to set forth their findings in terms of basic facts, rather than mere ultimate facts expressed in statutory language... (I)t would not be sufficient, under the Revised

Model State Act, simply to state that it found there was a stoppage of work at a plant caused by a labor dispute. It would be necessary for the agency to set forth the specific basic facts (e.g., the presence of the picket line, the effect of the picket line in preventing workers from entering the plant, the amount of production achieved, and the like) from which the ultimate facts were inferred.

State Administrative Law, II, p. 469.

27.5 CROSS-REFERENCES

Agencies which have adopted the Attorney General's model rule 20 state that they will rule on each proposed finding; to like effect is procedural rule 40-2.2(6)-P2290 of the Department of Professional and Occupational Licensing. The contested case rules of the Public Service Commission contain no such requirement.

Under the last provision of (2), federal regulations prevent the Human Rights Commission from disclosing the names of the parties in its decisions.

28. EX PARTE CONSULTATIONS

28.1 TEXT R.C.M. 82-4214; prop. M.C.A. 2-4-613

Unless required for disposition of ex parte matters authorized by law, the person or persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law in a contested case, after issuance of notice of hearing, shall not communicate with any party or his representative in connection with any issue of fact or law in such case except upon notice and opportunity for all parties to participate.

HISTORY: En. § 14, c.2, Ex.L.1971.

28.2 DERIVATION AND PURPOSE

McCrory used the words of § 13 of the Revised Model State Act and added "after issuance of notice of hearing", in order that "it will not be interpreted to apply to preliminary inquiries or investigation made to determine if formal contested case proceedings should be instituted." Study, II, p. 33. This was in the bill which Gov. Anderson vetoed in 1971. At that point, this section read as follows:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case, after issuance of notice of hearing, shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. Any agency member
>
> (1) may communicate with other members of the agency, and
>
> (2) may have the aid and advice of one or more personal assistants.

The bill was reintroduced in the special session with this section in the above form, but was amended in the Senate Judiciary Committee into the enacted form. Note that the amendments deleted the Model Act's more stringent restriction on issues of fact (with any person or party), and took out the words "directly or indirectly" and the entire second sentence.

28.3 COMMENTARY

As in the case of the disqualification provision (see ¶ 25.2), the significance of the words enacted by the legislature is highlighted by awareness of the words the legislature chose not to enact. The legislature did not limit any communication with a person who was not a party to the proceeding. A board member may consider a letter written to him by an interested observer, or a board may call in the hearing examiner to hear him review his findings. As to removal of the language permitting agency members to discuss the case among themselves, it would appear that this phrase added nothing in the light of the preceding amendment, and its removal took away nothing. Discussion is an integral part of the decision-making process for a multi-member board.

The prohibition runs only one way; it does not restrict a party from attempting to communicate with an agency member. Attorneys for parties are so restricted, however, by DR 7-110 of their Canons of Professional Ethics.

29. LICENSES

29.1 TEXT R.C.M. 82-4215; prop. M.C.A. 2-4-631

(1) When the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license is required by law to be preceded by notice and opportunity for hearing, the provisions of this part concerning contested cases apply.

(2) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(3) No revocation, suspension, annulment, withdrawal, or amendment of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

HISTORY: En. § 15, c.2, Ex.L.1971; am. § 16, c.285, L.1977.

29.2 DERIVATION AND PURPOSE

This section derives from § 14 of the Revised Model State Act; however, that section just covers the grant, denial, or renewal of a license. McCrory added the words "suspension, annulment, withdrawal, limitation or amendment" in (1), "by law" in (1), and "amendment" in (3). The Administrative Code Committee bill added the word "transfer" to (1) in 1977.

McCrory noted that:

> The intent of this section is to specifically include licensing among "contested cases."... The words "required by law" as used in (1) have the same broad meaning referred to in

the comment under (82-4202(3))...The intent of (82-4215) is to insure that contested case procedures will be followed in all licensing situations where a hearing is required by statute or as a matter of constitutional right, including the denial of a license on the basis of discretionary considerations.

Study, II, p. 34.

29.3 COMMENTARY

The denial of an initial application for an individual profession or occupational license is not ordinarily subject to a statutory opportunity for a hearing; the Medical Practice Act is one exception (at 66-1036, R.C.M. 1947). Whether denial of such an application without opportunity for hearing would raise a constitutional issue has yet to be decided in Montana. Cooper cites decisions in other states for the proposition that "at least where decision is based on a finding of fact, it seems clear that the same considerations should apply as in the revocation of licenses." State Administrative Law, I, p. 150. Where, on the other hand, an application on its face fails to meet licensure criteria established by statute or rule, no fact-finding is involved and the Montana licensing boards customarily return such applications without offering contested case hearings. In areas such as equivalency determinations, when a board decides whether an applicant's out-of-state experience is sufficiently equivalent to Montana license criteria to warrant reciprocity licensing, the lack of opportunity for hearing seems clearly at variance with the legislative history of this section.

The definition of a license encompasses many permits and certificates outside the professional/occupational area.

29.4 CROSS-REFERENCES AND FORMS

Model rule 9 and Professional and Occupational Licensing departmental form 4-A(2) (see ARM p.40-45) prescribe forms for immediate suspension of a license by emergency action pending a hearing. The respondent's first action when served with a notice of proposed or emergency suspension or revocation should be a simple request for the hearing. This may be coupled with an application for a more definite statement, as in Form 15 in the appendix.

30. JUDICIAL REVIEW--FILING PETITION FOR

30.1 TEXT R.C.M. 82-4216; prop. M.C.A. 2-4-701, 2-4-702

(1) (a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this part. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) A party who proceeds before an agency under the terms of a particular statute shall not be precluded from questioning the validity of that statute on judicial review, but such party may not raise any other question not raised before the agency, unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.

(2) (a) Proceedings for review shall be instituted by filing a petition in district court within 30 days after service of the final decision of the agency or if a rehearing is requested, within 30 days after the decision thereon. Except as otherwise provided by statute, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business or where the agency maintains its principal office. Copies of the petition shall be promptly served upon the agency and all parties of record.

(b) The petition shall include a concise statement of the facts upon which jurisdiction and venue are based, a statement of the manner in which the petitioner is aggrieved, and the ground or grounds specified in subsection (7) of this section upon which the petitioner contends he is entitled to relief. The petition shall demand the relief to which the petitioner believes he is entitled, and the demand for relief may be in the alternative.

(3) Unless otherwise provided by statute, the filing of the petition shall not stay enforcement of the

agency's decision. The agency may grant or the reviewing court may order a stay upon terms which it considers proper.

HISTORY: En. § 14, c.2, Ex.L. 1971; am. § 17, c.285, L.1977.

30.2 DERIVATION AND PURPOSE

Paragraph (1)(a) is identical to § 15(a) of the Revised Model State Act; (2)(a) is the same as § 15(b) of the Model Act except for specification of the proper district court; and (3) is the same as § 15(c) of the Model Act except for the words "unless otherwise provided by statute" at the beginning. McCrory inserted this phrase because several state statutes provide for automatic stays during the judicial review process. Study, I, 92.

Paragraphs (1)(b) and (2)(b) were added by McCrory and based upon similar provisions in SB179, the 1959 proposal. The first "insures that the agency will be apprised of and have an opportunity to rule on all issues." Study, I, 91. As to the second, he wrote that the Revised Model Act "does not give guidance with regard to the allegations which should be contained in a petition for review. It is believed that minimum requirements should be stated by statute." Study, I, p.92. The 1977 amendments made only non-substantive recodification changes.

30.3 CONSTRUCTION

A. "does not limit utilization of or the scope of judicial review under other means...provided by statute" (Sup.Ct. 1976): Under statute applicable at time of appeal from Milk Control Board decision, reviewing court could receive additional evidence and was not confined to record. *Vita-Rich Dairy, Inc. v. Dept. of Business Regulation*, ___Mont.___, *553 P.2d 980.*

B. "may not raise any other question not raised before the agency" (Sup.Ct. 1977): Appellant's attack on validity of rule applied in contested case would not be considered on appeal since not raised before agency. *Western Bank of Billings v. State Banking Board et al.*, ___Mont.___, *570 P.2d 1115.*

C. "within 30 days after service of the final decision" (Sup.Ct. 1977): Agency was estopped from asserting petition was not filed within this time limit, when agency itself had not proceeded under MAPA

in terms of notice or form of final decision. *State ex rel. Stowe v. Board of Administration, ___Mont.___, 564 P.2d 167.*

D. "or if a rehearing is requested, within 30 days after the decision thereon" (First Judicial Dist.Ct. 1975): Provision does not authorize agency to grant rehearing when agency has not adopted procedural rule providing for rehearings. *Burlington Northern, Inc. v. Public Service Comm., Civ.No. 38811.*

E. "Except as otherwise provided by statute...the county where the petitioner resides" (Sup.Ct. 1974): Appeal from decision of Board of SRS Appeals is not an action against county, and requirement of 93-2903, R.C.M. 1947, that action against county be tried in that county does not supercede MAPA. *State ex rel. Hendrickson v. Gallatin Co., 165 Mont. 135, 526 P.2d 354.*

30.4 COMMENTARY

In (1)(a), a "person" who meets certain criteria is entitled to judicial review, and persons are earlier defined to exclude agencies (cf. 5.1). Thus, when one state agency is a party to a proceeding before another state agency, MAPA does not authorize the first agency to petition for review of the second agency's decision. Cooper says this is the intent of the Revised Model State Act: "agencies as such are not entitled to the privileges which the Revised Model State Act creates for persons." State Administrative Law, 131. Specific statutes may allow any party, which can include an agency, to petition for review; an example is 84-709.1, R.C.M. 1947, under which the Department of Revenue may seek review of a State Tax Appeal Board decision.

Failure to exhaust administrative remedies can include such errors as not filing exceptions to the proposed decision of a hearing examiner or otherwise not pursuing appeal procedures within the agency. This requirement is sometimes relaxed in other jurisdictions when the issue is constitutional, jurisdictional, or purely a question of law. Davis, Adm. Law Treatise, § 20.09; Cooper, State Adm. Law, 575.

These authorities note that whether one must ask for a rehearing after the final decision in order to exhaust his remedies is a troublesome question. In Montana, the Public Service Commission now has a rule allowing motions for rehearing or reconsideration, and

making its decisions final and appealable if the motion is not filed within 10 days. ARM 38-212(64)-P2750. The Attorney General's model rules contain no provision for rehearing, however, and the reasoning of the district court in the Burlington Northern case would still be applicable to agencies using the model rules. To be thoroughly on the safe side, appellants sometimes file the petition for judicial review and a motion to reconsider at the same time.

30.5 FORM

Form 13 in the appendix is a sample petition for judicial review. If the pleader seeks a stay or other intermediate relief, he will probably attach a copy of the final agency order, and perhaps an affidavit as to injury, to the petition.

31. RESPONSES TO THE PETITION--ADDITIONAL EVIDENCE--ARGUMENT

31.1 TEXT: R.C.M. 82-4216; prop. M.C.A. 2-4-703, 2-4-704

(4) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(6) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

HISTORY: En. § 16, c.2, Ex.L.1971.

31.2 DERIVATION AND PURPOSE

These subsections are identical to the corresponding portions of § 15 of the Revised Model State Act. Neither the Model Act notes nor McCrory's study discuss them.

31.3 COMMENTARY

A pre-trial conference can be a useful device for shortening the transcript and sometimes, for determining who among multiple parties to the hearing is a party to the appeal.

When the record is certified to the court, a party generally brings the matter up for argument by moving for judgment on the pleadings or summary judgment. Argument then proceeds on the court's law and motions calendar.

Whether the deciding agency should file a brief and argue in support of its decision is unclear in some contexts. An occupational licensing board, usually having initiated the contested case, will naturally play an active part in judicial review. An agency whose sole function is adjudication, such as the State Tax Appeal Board, certifies the record and plays no further role in judicial review. Agencies like the Public Service Commission and the Board of Natural Resources and Conservation do not ordinarily initiate cases and do ordinarily adjudicate the contentions of opposing parties, yet these agencies sometimes take an active part in judicial review of their decisions. This latter type of agency is making, advancing, refining some sort of public policy by its contested case decisions, while a "pure tribunal" like the tax appeal board is not charged with fashioning state taxation policy.

32. GROUNDS FOR JUDICIAL REVIEW

32.1 TEXT: R.C.M. 82-4216; prop. M.C.A. 2-4-704

(7) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(g) because findings of fact, upon issues essential to the decision, were not made although requested.

HISTORY: En. § 16, c.2, Ex.L.1971; am. § 17, c.285, L.1977.

32.2 DERIVATION AND PURPOSE

The subsection is identical to the corresponding portion of § 15 in the Revised Model State Act, through and including the arbitrary or capricious standard. McCrory added (g), on requested findings of fact, borrowing the language from the Oklahoma APA, 75 Okl.St. § 322(1)(g). The 1977 amendment changed "court shall not" to "court may not" in the opening phrase to avoid a false imperative.

The Commissioners on Uniform State Laws observed that they were changing the "substantial evidence" standard in their original Model Act to the "clearly erroneous" standard in (e):

> This change places court review of administrative decisions on fact questions under

the same principle as that applied under Federal Rules of Civil Procedure in connection with review of trial court decision. See Rule 52(a). Also see United States v. U.S. Gypsum Co. (1948), 333 U.S. 364, 68 Sup.Ct. 525, and Barron and Holtzoff, Federal Practice and Procedure, Par. 1133. This standard of review does not permit the court to "weigh" the evidence, or to substitute its judgment on discretionary matters, but it does permit setting aside "clearly" erroneous decisions. Certainly a clearly erroneous decision should not be permitted to stand.

32.3 CONSTRUCTION

A. "clearly erroneous" (Sup.Ct.1977): A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Brurud v. Judge Moving & Storage Co., ___Mont.___, 563 P.2d 558.*

B. "clearly erroneous" (Sup.Ct.1977): This court has repeatedly held that its function on appeal is to determine whether there is substantial evidence in the record to support the judgment. *Western Bank of Billings v. State Banking Board et al., ___Mont.___, 570 P.2d 1115.*

C. "because findings of fact...were not made although requested" (Sup.Ct.1977): Even if findings were essential, appellant did not show that it had been requested of the agency. *Garsjo v. Dept. of Labor and Industry, ___Mont.___, 562 P.2d 473.*

32.4 COMMENTARY

Davis contends that the Revised Model State Act should have followed the substantial evidence test of the federal APA, rather than the clearly erroneous test, because of the quantity and quality of interpretation of the former standard by federal courts and because of conceptual difficulties with the latter. Treatise, 1970 Supp., § 1.04-6.

Jaffe, in his Judicial Control of Administrative Action, writes at p. 615 that "there are conscientious judges who find difficulty in deriving for themselves the distinction between 'clearly erroneous' and the present 'substantial evidence' standard." The Brurud and Western

Bank opinions of the Montana Supreme Court tend to support this observation.

McCrory, in his 1977 article in MAPA, observes a "general agreement that a court has broader review authority under this (clearly erroneous) test than under the substantial evidence test." 38 Mont.L. Rev., pp.21-22. He cites the Washington decision in Ancheta v. Daly, 77 Wash.2d 255, 461 P.2d 531 (1969), where the court did reach this conclusion after the Washington APA was changed from substantial evidence to clearly erroneous. In that opinion as in the Brurud opinion here, the courts relied on the United States Gypsum case cited by the Commissioners. It would appear that the Brurud decision is a more substantiated interpretation of the clearly erroneous test.

32.5 CROSS-REFERENCE

For the consequences of submitting proposed findings, see also the commentary at ¶ 27.4 and the Supreme Court holding in the Consumer Counsel case noted therein.

33. APPEAL TO SUPREME COURT

33.1 TEXT: R.C.M. 82-4217; prop. M.C.A. 2-4-711

An aggrieved party may obtain review of a final judgment of a district court under this part by appeal to the supreme court within 60 days after entry of judgment. Such appeal shall be taken in the manner provided by law for appeals from district courts in civil cases. Unless otherwise provided by statute or unless the agency has granted a stay through the completion of the judicial review process:

(1) if appeal is taken from a judgment of the district court affirming an agency decision, the agency decision shall not be stayed except upon order of the supreme court; except that, in cases where a stay is in effect at the time of the filing of notice of appeal, the stay shall be continued by operation of law for 20 days from the date of filing of the notice;

(2) if appeal is taken from a judgment of the district court reversing or modifying an agency decision, the agency decision shall be stayed pending final determination of the appeal unless the supreme court orders otherwise.

HISTORY: En. § 17, c.2, Ex.L.1971; am. § 18, c.285, L.1977.

33.2 DERIVATION AND PURPOSE

The first two sentences are derived from § 16 of the Revised Model State Act, with minor modifications. The remainder of the section, dealing with stays, is original. All McCrory said of this latter portion is that a similar provision had been in the bill introduced in the 1959 legislature to enact an administrative procedure law. Study, II, p.39. Sullivan had explained of that provision:

> Most of the agency statutes do not cover the question of stay on appeal to the Supreme Court. Under the general provisions of the Code of Civil Procedure otherwise applicable, in most cases an appeal would operate to stay the district court's judgment irrespective of whether it upheld or reversed the agency's decision.
>
> 21 Mont.L.Rev., 177.

33.3 CROSS-REFERENCE

Rule 7(c) of the Rules of Appellate Civil Procedure provides, when the district court grants a writ of mandamus or prohibition against an agency, that no stay of proceedings may be allowed pending the appeal.

34. DECLARATORY RULINGS BY AGENCIES

34.1 TEXT: R.C.M. 82-4218; prop. M.C.A. 2-4-501

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A declaratory ruling, or the refusal to issue such a ruling, shall be subject to judicial review in the same manner as decisions or orders in contested cases.

HISTORY: En. § 18, c.2, Ex.L.1971.

34.2 DERIVATION AND PURPOSE

This is derived from § 8 of the Revised Model State Act with changes noted by McCrory:

> It is not uncommon for an individual to be uncertain as to whether particular activity which he contemplates would violate a statute or an agency rule or order. A dilemma results; forego the activity and avoid the potential problem, or engage in the activity and risk the consequences of violating a statute, rule or order. (This section) is intended to eliminate the injustices created by such dilemmas by providing a procedure for agencies to make declaratory rulings.
>
> (This section) embodies the declaratory ruling provisions of the Revised Model Act with one addition. The final sentence has been modified (and language added) to insure that agencies do not have unlimited discretion in refusing to make declaratory rulings...(M)odification of the final sentence in (this section) will insure that declaratory rulings will be issued where the circumstances warrant.
>
> Study, II, p.40.

The last sentence in the Revised Model State Act reads as follows: "Rulings disposing of petitions have the same status as agency decisions or orders in contested cases."

34.3 COMMENTARY

At first glance, this section seems to have many practical uses. An agency's understanding of a statute can

be drawn out even though the agency has adopted no rules and decided no cases under the statute. A petitioner dissatisfied with the agency's ruling can go to district court and test the interpretation under the "clearly erroneous" or "violation of statutory provisions" standards.

However, this section is very seldom used. The Attorney General's model rules for the proceeding were discouragingly formal: the petition had to trigger a contested case hearing. While judicial review under 82-4216 would require a record, it is not clear that the record must include oral testimony taken at a hearing. For the purpose of making declaratory rulings, it should be possible to assemble a quite serviceable record from mailed documents. The agency does not have to "find" facts under this section; it is sufficient to say in the subjunctive that if the facts were as alleged in the petition, then certain legal conclusions would, in the agency's view, follow.

According to Cooper, the Commissioners on Uniform State Laws made changes from the original model act to the revised version for the purpose of encouraging greater use of this procedure. One change eliminated a provision that denied binding effect to a ruling unless issued after hearing. "(T)here is no reason," he wrote, "why the agency's ruling should not be binding if based on written submissions or conference, rather than on oral argument." State Adm. Law, I, 242.

34.4 CROSS-REFERENCES AND FORMS

The Attorney General's 1977 revision of the model rules may loosen up the declaratory ruling procedure. Under model rule 22, the record consists of the petition, a statement of matters officially noticed, and the ruling; a transcript of testimony is included only if for good cause shown, a hearing has been conducted. Model rule 24 makes a declaratory ruling binding between agency and petitioner on the facts as stated in the petition. A form for petitions is set forth in model rule 22 and also as form 21 in the appendix to this handbook.

35. DECLARATORY JUDGMENT ON VALIDITY OR APPLICATION OF RULES

35.1 TEXT: R.C.M. 82-4219; prop. M.C.A. 2-4-506

A rule may be declared invalid or inapplicable in an action for declaratory judgment if it is found that the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff. A rule may also be declared invalid in such an action on the grounds that the rule was adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute, as evidenced by documented legislative intent. If the administrative code committee has objected to the adoption or amendment of a rule on the grounds set forth in the preceding sentence, the agency bears the burden, in any action brought under this section, of proving that its rule was not adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute. The action may be brought in the district court for the county in which the plaintiff resides or has his principal place of business or in which the agency maintains its principal office. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

HISTORY: En. § 19, c.2, Ex.L.1971; am. § 5 c.560, L.1977.

35.2 DERIVATION AND PURPOSE

The original section was identical to § 7 of the Revised Model State Act except that McCrory substituted the verb "found" for the Model Act's "alleged" in the first sentence, in order "to require that the court's authority to act is based upon a finding rather than a mere allegation." Study, II, p.41. A note of the Commissioners on Uniform State Laws states that "(t)he Uniform Declaratory Judgments Act does not reach invalid administrative rules and, therefore, there is no possibility of conflict with that act or with state acts conforming thereto." McCrory's opinion, on the other hand, was that this authority was "probably available under the Uniform Declaratory Judgments Act," but he included the provision "to insure that the procedure is available." Study, II, p.41.

The 1977 amendment, inserting the second and third sentences and slightly rewording the first for grammatical clarity, was enacted by Senate Bill 37, another

proposal of the Administrative Code Committee. The committee described the introduced bill in its report:

> The bill...would allow the courts to enforce the legislature's intent by (a) documenting that intent through written committee reports on bills which delegate powers to state agencies and (b) placing the burden of proof on an agency that it had not arbitrarily disregarded legislative intent when, in the interim, the committee opposed a rule on this basis. Usually, the burden of proving a rule unreasonable is upon the party objecting to the rule. This reverse-burden formula is derived from a similar section of the Iowa APA. The requirement that legislative intent be documented during the session will assure that any action taken against a proposed rule is taken responsibly. The committee feels that it should function as the legislature's agent and not as its alter ego.
>
> Report, pp.10-11.

Differing Senate and House provisions for the documentation of legislative intent could not be resolved in conference committee, and that portion of the bill, as enacted, merely calls for a procedure for the documentation of intent in the joint rules governing future legislative sessions. Cf, 43-522, R.C.M. 1947.

35.3 COMMENTARY

This section has a number of potential applications not yet seen in court. An unwritten or unpublished rule could be thrown out, at the behest of a properly injured plaintiff, simply for lack of proper publication. The "reasonably necessary" test for a rule, created in 82-4204.1, is expanded here; not only must a rule carry out the purpose of the statute, discerned by reading the statute, but also--if the legislature records intent outside the statute--a rule must conform to that intent.

Documents ancillary to a statute which discuss the intent of the statute are known as extrinsic sources of legislative intent, and are analyzed in detail in Sutherland, Statutory Construction (4th ed. 1973), ch. 48. None of these sources--sponsor statements, standing committee reports, recorded floor debate, etc.--have been used in Montana. The only ancillary document of significance is the fiscal note, prepared

in the governor's office, which guesses what a bill would cost or bring in. The Montana legislature is a procedurally conservative body, and any procedure for documenting intent on a bill outside the bill itself would be a novel departure.

36. SUBPOENAS AND DISCOVERY

36.1 TEXT: R.C.M. 82-4220; prop. M.C.A. 2-4-104, 2-4-602

(1) An agency conducting any proceeding subject to this part shall have the power to require the furnishing of such information, the attendance of such witnesses, and the production of such books, records, papers, documents, and other objects as may be necessary and proper for the purposes of the proceeding. In furtherance of this power, an agency upon its own motion may, and upon request of any party appearing in a contested case shall, issue subpoenas for witnesses or subpoenas duces tecum. The method for service of subpoenas, witness fees, and mileage shall be the same as required in civil actions in the district courts of the state. Except as otherwise provided by statute, witness fees and mileage shall be paid by the party at whose request the subpoena was issued.

(2) In case of disobedience of any subpoena issued and served under this section or of the refusal of any witness to testify as to any material matter with regard to which he may be interrogated in a proceeding before the agency, the agency may apply to any district court in the state for an order to compel compliance with the subpoena or the giving of testimony. If the agency fails or refuses to seek enforcement of a subpoena issued at the request of a party or to compel the giving of testimony considered material by a party, the party may make such application. The court shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unjustified, the court shall enter an order requiring compliance. Disobedience of such order shall be punishable by contempt of court in the same manner and by the same procedures as is provided for like conduct committed in the course of civil actions in district courts. If another method of subpoena enforcement or compelling testimony is provided by statute, it may be used as an alternative to the method provided for in this section.

(3) Each agency shall provide in its rules of practice for discovery prior to a contested case hearing.

HISTORY: En. § 20, c.2, Ex.L.1971; am. § 19, c.285, L.1977.

36.2 DERIVATION AND PURPOSE

Subsections (1) and (2) have no counterpart in the Revised Model State Act, a "serious omission" in McCrory's view, because the inability to present a proper defense through lack of subpoena power could work a denial of due process. He quoted from Andrews v. Nevada Board of Cosmetology, 467 P.2d 96 (Nev.1970) in support of this position. Study, I, pp. 96-97. McCrory also pointed out that agencies may subpoena testimony in either rulemaking or contested cases while parties were entitled to subpoenas in contested cases only. Study, I, p.97.

Subsection (3), providing for discovery, was amended into this section by the Administrative Code Committee's revision bill in 1977; the committee's report contains no comment on the change.

36.3 COMMENTARY

Discovery can drag down expectations of having quick and informal hearings; the Administrative Code Committee decided to propose the change only after concluding that the benefits somewhat outweighed the drawbacks. In appeals from county tax appeal boards to the state tax appeal board, where the taxpayer often represents himself, discovery is not available pursuant to 84-709(4), R.C.M. 1947. Tax cases going directly from the Department of Revenue to STAB may be conducted with discovery, however, under 84-709.4(4) and the observations made in W. R. Grace & Co. v. Dept. of Revenue, ___Mont.___, 567 P.2d 913 (1977).

36.4 CROSS-REFERENCES AND FORMS

The Attorney General's model rule 13 basically adopts the discovery provisions of the Montana Rules of Civil Procedure for administrative practice; thus most forms used for district court discovery can, with changes to captions and officers, serve as well for agency discovery. The Public Service Commission has independently incorporated the same provisions but encourages the use of less formal "data requests," Rule ARM 38-2.2(42)-P2390.

As for subpoenas, service, fees and mileage for civil actions are covered under Rule 45, M.R.C.P., and 25-404, R.C.M. 1947.

37. REPRESENTATION

37.1 TEXT: R.C.M. 82-4221; prop. M.C.A. 2-4-105

Any person compelled to appear in person or who voluntarily appears before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel. In a proceeding before an agency, every party shall be accorded the right to appear in person or by or with counsel but this part shall not be construed as requiring an agency to furnish counsel to any such person.

HISTORY: En. § 21, c.2, Ex.L.1971; am § 20, c.285, L.1977.

37.2 DERIVATION AND PURPOSE

This section first appeared in SB179, the 1959 bill. Sullivan explained that "(o)f existing Montana statutes respecting administrative agencies, in only seventeen is this right specified. In many of these the requirement is applicable only to one or two of numerous adjudicatory functions exercised by the agency, or is specified as to some parties but not to others. 21 Mont.L.Rev., 170. McCrory put the section in the 1971 bill, saying the right to counsel "should be uniformly recognized for all state agencies." Study, I, p.98. The last qualification ("shall not be construed," etc.) was inserted in the reintroduced bill after Gov. Anderson's veto, and "this act" became "this part" in 1977.

37.3 CROSS-REFERENCES

Rule 46-2.2-P240 of the Department of Social and Rehabilitation Services permits, under certain circumstances, a medical provider to represent a recipient in a fair hearing on benefit claims. The rule was upheld in County of Blaine v. Moore, ___Mont.___, 568 P.2d 1216.

The Public Service Commission permits Class B Interstate Commerce Commission practitioners, who are not attorneys, to represent others before it.

38. SERVICE OF PLEADINGS

38.1 TEXT: R.C.M. 82-4222; prop. M.C.A. 2-4-106

Except where a statute expressly provides to the contrary, service in all agency proceedings subject to the provisions of this part and in proceedings for judicial review thereof shall be as prescribed for civil actions in the district courts.

HISTORY: En. § 22, c.2, Ex.L.1971; am. § 21, c.285, L.1977.

38.2 DERIVATION AND PURPOSE

McCrory also went back to SB179, the 1959 proposal, for this section. Sullivan's comment thereon: "Some Montana statutes providing for service of papers in agency proceedings do not state how such papers are to be served; (the section) provides that in such instances service shall be in the same manner as prescribed for civil court actions." 21 Mont.L.Rev., 170.

38.3 CROSS-REFERENCES

Rule 4 of the Montana Rules of Civil Procedure, providing for service by summons of the initial complaint filed in district court, is not often appropriate for an administrative contested case. As noted at § 21.4, a matter can become a contested case in a wide variety of ways. Rule 5 of the M.R.C.P., governing service of subsequent pleadings, is generally used for administrative pleadings after a matter becomes a contested case. This is the familiar certificate of mailing. After the final decision, a petition for judicial review would be served under Rule 4.

39. CONSTRUCTION AND EFFECT; REPEALER

39.1 TEXT: R.C.M. 82-4223, 82-4224; prop. M.C.A. 2-4-107

Construction and effect. Nothing in this part shall be considered to limit or repeal requirements imposed by statute or otherwise recognized law. No subsequent legislation shall be considered to supersede or modify any provision of this part, whether by implication or otherwise, except to the extent that such legislation shall do so expressly.

Repeal of inconsistent provisions. All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

HISTORY: En. § 23,24, c.2, Ex.L.1971.

39.2 DERIVATION AND PURPOSE

Not in Revised Model Act; derived from like provision in SB179.

APPENDIX--FORMS

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NOTES ON USE OF FORMS

Forms are set forth in the context of several hypothetical situations involving a bar using the name of the grandfather of law school hypotheticals, Blackacre. These forms are a composite of pleadings used in a variety of state agencies and are NOT represented as official forms of the Montana Department of Revenue or any other particular agency, nor do the hypothetical situations reflect norms of practice before the Department of Revenue's Liquor Division. Note that the Blackacre Bar changes from a partnership to a corporation between form 13 and form 14; a "floater" license of course cannot be held by a corporation. This emphasizes that the content of the forms is NOT represented to state prevailing interpretations of the Montana Alcoholic Beverage Code and also that any similarity to actual persons living or dead is purely coincidental.

The pleader should remember the Montana Supreme Court's observations in Western Bank of Billings vs. State Banking Board, that administrative pleadings shall be construed to do substantial justice and that technical standards of pleading are relatively unimportant to administrative procedure. The common-sense solution to a pleading problem will therefore generally be the right solution.

-Roger Tippy-

Form 1

REQUEST TO INSPECT RULES AND STATEMENTS
OF POLICY OR INTERPRETATION

John Doe, Administrator
Liquor Division, Department of Revenue
State of Montana
Helena, Montana

Dear Mr. Doe:

I am representing a potential applicant before you for a transfer of a license to sell liquor, wine and beer at retail, pursuant to section 4-4-206, RCM 1947. This statute authorizes the department to approve the transfer of an all-beverage license upon a finding (among others) that the public convenience and necessity would be served thereby. Reference to the Administrative Rules of Montana indicated that the department has adopted no clear criteria in the form of rules for establishing public convenience and necessity.

Therefore, as permitted under the Montana Administrative Procedure Act (82-4203), I request that the division permit me to inspect, at a mutually convenient time, upon its premises, any documents in its possession which the division would consider useful in making a public convenience and necessity decision.

Possible examples would be prior decisions on transfer applications under the current provisions of section 4-4-206, any internal memoranda or in-house studies, and any studies, reports or regulations from other states which the division deems relevant to this subject.

Sincerely yours,

CHARLES COE
Attorney at Law

Form 2

PETITION TO AMEND RULE

(from legislator)

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of amending ARM 42-2.12(6)-S12013 to provide criteria for establishing public convenience and necessity.	)))))	PETITION TO AMEND RULE ARM 42-2.12(6)-S12013

1. Petitioner's name and address is Senator Sam Sloe, District 51, Montana State Senate, 2525 Division Street, Caucus, Montana.

2. He brings this petition on behalf of constituents who hold interests in a tavern with an all-beverage license in a quota area where such licenses currently exceed the quota therefore by more than 25% and who desire to relocate their tavern business to another quota area where the all-beverage licenses exceed the quota by less than 25%. Such transfer is authorized under the provisions of 4-4-206, R.C.M. 1947, if petitioner's constituents can demonstrate at a public hearing that public convenience and necessity would be served by the transfer. These constituents desire to know the criteria by which the department would determine public convenience and necessity before they undertake the expenses of preparing an application, securing an option on new premises, etc. Petitioner therefore proposes that the department adopt rules for such criteria as follows:

3. The rule as proposed to be amended would read as follows:

4-2.12(6)-S12013 TRANSFER OF LICENSES. (1) (no change)

(2) (no change)

(3) (all new) Applications to transfer an existing license to a new quota area under 4-4-206, R.C.M. 1947, shall be supported by evidence (in the form of affidavits or pre-filed written testimony) that approval of the transfer will serve the public convenience and necessity. In making this determination the department may consider such factors as:

(a) the number of all-beverage licenses presently serving the area in relation to the population of the area, as this ratio compares to such ratios in comparable communities;

(b) adequacy of existing services in the neighborhood or portion of the quota area into which transfer is proposed;

(c) socio-economic trends in the area;

(d) any special services (such as meeting facilities or restaurant service) proposed to be offered in conjunction with

Form 2 (continued)

beverage sales, which special services would satisfy unmet demands in the quota area; and

(e) safe and adequate parking and traffic access.

4. The department has adequate authority to adopt the above amendment under 4-1-303, R.C.M. 1947, and the amendment would aid in the efficient administration of the Alcoholic Beverage Code by focusing transfer hearings on relevant issues.

/s/ SAM SLOE
Senator, Dist. 51

Dated February 28, 1977

Form 3

AFFIDAVIT AS TO PUBLIC CONVENIENCE AND NECESSITY

IN THE MATTER OF the application of Robert Roe and Victor VanGoe for authority to transfer an all-beverage license to Anytown, Montana.) AFFIDAVIT OF DARLENE DEFOE

STATE OF MONTANA)
: ss.
County of Anywhere)

DARLENE DEFOE, being first duly sworn, deposes and says:

That I reside at 248 Main Street, Anytown, Montana, and have resided in Anytown for the past twelve years.

That I am employed as a loan officer at the Anytown State Bank, 1921 Dixon Street, Anytown, Montana, and have been so employed for the past four years.

That I am familiar with the Statehood Avenue area of Anytown in which Robert Roe and Victor VanGoe propose to transfer the license of the Blackacre Bar & Grill for the purpose of opening a tavern and restaurant.

That a restaurant with beverage service in that section of Anytown would serve the public convenience and necessity for the following reasons:

(1) * * *

(2) * * *

_____

SUBSCRIBED AND SWORN before me this_____day of_____, 1978.

_____
NOTARY PUBLIC

Form 4

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the application of Robert Roe et al., d/b/a Blackacre Bar & Grill, for authority to transfer an all-beverage license to Anytown, Montana	PETITION TO INTERVENE

The Anytown Supper Club, by its undersigned attorney, moves the Department for leave to intervene as a party to the above-entitled proceeding. The grounds for this petition are as follows:

1. The proposed relocation of the applicant's tavern business to the west side of Anytown, Montana would not be justified on the basis of public necessity.

2. The welfare of the people residing on the west side of Anytown, Montana would be adversely affected by the presence of an additional tavern there.

DATED: March 11, 1978

Respectfully submitted,

ANYTOWN SUPPER CLUB
377 7th Street
Anytown, Montana

By_____
BUFORD BEAU
94 Grand Street
Anytown, Montana

Form 5

SETTING UP PRE-HEARING CONFERENCE

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the application of Robert Roe et al., d/b/a Blackacre Bar & Grill, for authority to transfer an all-beverage license to Anytown, Montana	NOTICE OF PRE-HEARING CONFERENCE

TO ALL PARTIES OF RECORD:

1. The hearing examiner, on his own motion, has scheduled a pre-hearing conference on this case March 22, 1978 at 10 a.m. in the meeting room of the Anytown State Bank.

2. The conference is called pursuant to section 82-4211, R.C.M. 1947 for the purposes of considering simplification of the issues by consent of the parties, hearing preliminary motions, and formulating a schedule for the proceeding.

3. The applicant and any interested person establishing grounds to participate as a party to the hearing will be admitted as parties. Parties or their counsel are directed to appear at the date and time mentioned above and should be prepared to identify and consider matters including, but not limited to, the following:

(a) facts which the parties may agree are true and which will require no proof;
(b) issues of fact and law;
(c) amendments to the application;
(d) exhibits which may be introduced;
(e) witnesses which may be called;
(f) pre-hearing motions; and
(g) pre-hearing discovery desired, if any.

4. The parties will be requested to formulate and stipulate to a list of exhibits to be admitted in evidence at the hearing without proof or objection.

5. Request for a change of the date or time of the conference will be considered by the hearing examiner.

Dated: March 13, 1978

_____
Hearing Examiner

Form 6

PRE-HEARING ORDER

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

(Same Caption)	)	PRE-HEARING ORDER OF PROCEDURE

Pursuant to notice, a pre-hearing conference was conducted March 22, 1978 before the hearing examiner, with Charles Coe, Esq., representing the applicant and Buford Beau, Esq., representing the intervenor.

1. The applicant will call the following witnesses at the hearing:
   (a) Darlene DeFoe
   (b) Robert Roe
   (c) * * *
2. The intervenor will call the following witnesses at the hearing:
   (a) Zelda Zoe
   (b) Millicent Moe
   (c) * * *
3. The following documents or excerpts thereof will be admitted as joint exhibits by stipulation of the parties:
   (a) 1970 Census Report--Montana (population of Anytown)
   (b) 1976 population estimates, Montana Department of Community Affairs (Anytown)
   (c) tavern license totals currently issued in the Anytown license quota area, per records of the Department of Revenue
4. The following exhibits will be offered by the applicant at the hearing:
   (a) Comprehensive Plan 1985, Anytown Planning Commission
   (b) * * *
5. The following exhibit will be offered by the intervenor at the hearing:
   (a) * * *
6. The parties will file all requests for discovery not later than April 9, 1978.
7. The hearing will commence at 10 a.m. in the meeting room of the Anytown Public Library, Dixon and 7th Streets, Anytown, Montana on May 2, 1978.

Dated: March 16, 1978

_____
Hearing Examiner

Form 7

SUBPOENA FOR DEPOSITION

Hearing Examiner
Department of Revenue

RE: Application of Robert Roe, et al.

Dear Sir:

The Anytown Supper Club requests the Department to issue it a subpoena for the purpose of taking the deposition of the co-applicant, Robert Roe, for discovery purposes.

Sincerely,

BUFORD BEAU
Attorney at Law

cc: All parties of record

(NOTE: Subpoenas may also be requested for the purpose of bringing a witness to the hearing, and the forms for requesting and issuing such subpoenas will differ from this material. Some agencies may also have a different form for the subpoena duces tecum.)

Form 7

SUBPOENA FOR DEPOSITION

IN THE MATTER OF the application of Robert Roe et al., d/b/a Blackacre Bar & Grill, for authority to transfer an all-beverage license to Anytown, Montana.	))))))	SUBPOENA

TO: Robert Roe
5743 Division Street
Caucus, Montana

You are hereby directed to appear before a person authorized by law to take depositions at the City Council meeting room, Anytown City Hall, Anytown, Montana on April 4, 1978, at 10 a.m., for the taking of your deposition in this proceeding and to have with you at that time and place the following: financial records of the Blackacre Bar & Grill for the last four years. If you fail to appear you may be ordered to do so by the District Court.

WITNESS my hand and the seal of the Department on March 26, 1978.

_____
Hearing Examiner

(Return executed on back by serving party)

Form 8

PROTECTIVE ORDER

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the application of Robert Roe, et al., d/b/a Blackacre Bar & Grill, for authority to transfer an all-beverage license to Anytown, Montana.	)))))	MOTION FOR PROTECTIVE ORDER

COMES NOW Robert Roe, co-applicant for transfer authority in the above-entitled proceeding, and moves the Department to enter a protective order in substantially the form attached to this motion. Mr. Roe submits that justice requires, and Rule 26(C), M.R.C.P. permits, the entry of such an order to protect him from annoyance and embarrassment and to prevent a conflict between the demands of his individual privacy and the merits of public disclosure. Specifically, Mr. Roe requests that his financial records not be inquired into during discovery or hearing, or that discovery inquiries based upon his financial records be directed to a neutral accountant selected by attorneys for the parties and that such neutral accountant answer only such questions as are relevant to Mr. Roe's prospects of earning an adequate return from his investment in the Blackacre Bar & Grill if it is transferred to Anytown, Montana. Any other purpose for the examination of Mr. Roe's financial records would not be relevant to the issues in this case.

DATED: April____, 1978.

ROBERT ROE

By_____
Charles Coe

ATTACHMENT PROTECTIVE ORDER

IT IS HEREBY ORDERED, upon motion granted, that the financial records of Robert Roe shall not be inquired into or examined by any party to this proceeding. A party seeking information relevant to the issues in this proceeding from Robert Roe's financial records shall retain at his expense a certified public accountant, to be selected by his attorney and Mr. Roe's attorney. The accountant may examine Mr. Roe's financial records and be questioned, in the presence of counsel for all parties, as to such aspects of Mr. Roe's financial situation disclosed from his financial records as is relevant to Mr. Roe's prospects for earning an adequate return from his interest in the Blackacre Bar & Grill if the license therefor is transferred as requested in this proceeding.

DATED:_____

_____
Hearing Examiner

Form 9

MOTION TO TAKE OFFICIAL NOTICE

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the application of Robert Roe, et al., d/b/a Blackacre Bar & Grill, for authority to transfer an all-beverage license to Anytown, Montana	))))))	MOTION TO TAKE OFFICIAL NOTICE

COMES NOW Anytown Supper Club, party-intervenor in the above-entitled proceeding, and moves the Department of Revenue to take official notice that:

1. Within the license quota area of Anytown, Montana, the department has issued four currently valid retail beer licenses with wine amendments.

2. Under the department's rule ARM 42-2.12(6)-S12005, a wine amendment may be issued only upon the applicant's demonstration that the sale of wine is supplemental to a prepared food business.

3. The four aforesaid licenses constitute restaurants with on-premise alcoholic beverage service within the quota area of Anytown, Montana.

DATED: March 26, 1978

ANYTOWN SUPPER CLUB

By_____
Buford Beau
Attorney at Law

(Certificate of Service)

Form 10

CONTESTING FACT PROPOSED TO BE NOTICED

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the application of Robert Roe, et al., d/b/a Blackacre Bar & Grill, for authority to transfer an all-beverage license to Anytown, Montana.	))))))	MOTION TO CONTEST FACT PROPOSED TO BE OFFICIALLY NOTICED

COMES NOW the Blackacre Bar & Grill and moves the hearing examiner for opportunity to contest fact no. 3 proposed to be officially noticed by the intervenor's motion of March 26, 1978, on the following grounds:

That three of the four beer-and-wine licenses in the Anytown license quota area serve prepared food only in the form of pizza and/or spaghetti, and that a food menu so limited does not meet the criteria for a "full service restaurant" as defined by the American Restaurant Association.

DATED: March 30, 1978

BLACKACRE BAR & GRILL

By_____
Charles Coe

(Certificate of Service)

Form 11

EXCEPTIONS

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the application of Robert Roe, et al., d/b/a Blackacre Bar & Grill, for authority to transfer an all-beverage license to Anytown, Montana.	)	EXCEPTIONS OF ANYTOWN SUPPER CLUB TO PROPOSED DECISION

The Anytown Supper Club, intervenor in the above-entitled action, submits the following exceptions to the proposed decision of the hearing examiner:

1. The proposed decision does not contain any finding as to the anticipated profit margin of the Blackacre Bar & Grill at the Statehood Avenue location in Anytown. The absence of such a finding causes the decision to be void and inadequate to support the proposed order approving the transfer.

2. The proposed decision contains a finding of fact that there are only three restaurants in Anytown with full food and beverage service, which is contrary to uncontradicted testimony (transcript pages 87 and 92-94) and thus unsupported by the weight of the evidence.

DATED: June 16, 1978

ANYTOWN SUPPER CLUB

By_____
Buford Beau

(Certificate of Service)

Form 12

AFFIDAVIT FOR DISQUALIFICATION

(Personal Bias)

BEFORE THE STATE TAX APPEAL BOARD
STATE OF MONTANA

IN THE MATTER OF the application of Robert Roe, et al., d/b/a Blackacre Bar & Grill, for authority to transfer an all-beverage license to Anytown, Montana.	AFFIDAVIT FOR DISQUALIFICATION

STATE OF MONTANA)
: ss.
County of Anywhere)

ROBERT ROE, being first duly sworn, deposes and says:

1. He is a partner in the partnership doing business as Blackacre Bar & Grill and is authorized to speak on behalf of the partnership in the above-entitled matter.

2. Blackacre Bar & Grill is a party to the above-entitled matter.

3. He files this affidavit of personal bias in good faith and timely fashion pursuant to 82-4211, R.C.M. 1947, and requests that in all proceedings held on or after this date, Martin Moe, member of the State Tax Appeal Board, disqualify himself from any participation in the above-entitled matter, either in the conduct of hearings or as a deliberating and voting member of the Board.

4. In the event that Martin Moe fails to disqualify himself from the above-entitled proceeding, Affiant requests that the State Tax Appeal Board disqualify him from such participation and make its decision part of the record in the above-entitled matter.

5. The grounds for this affidavit and request are that the Blackacre Bar & Grill believes it cannot have a fair and impartial hearing or consideration before Martin Moe and specifically:

(a) That Martin Moe is the brother-in-law of Zelda Zoe, part-owner of the Anytown Supper Club, a party to the above-

Form 12 (continued)

entitled proceeding which has intervened in opposition to Blackacre's application.

(b) That the same Zelda Zoe has testified at a hearing conducted by the Department of Revenue in this proceeding, to the effect that Blackacre's application for a license transfer would not serve the public convenience and necessity and that her brother-in-law, Martin Moe, cannot review this portion of the record without bias.

_____
ROBERT ROE

SUBSCRIBED AND SWORN before me this 30th day of June, 1978.

_____
Notary Public
Residing at Anytown, Montana
My commission expires:

Form 13

PETITION FOR JUDICIAL REVIEW

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK.

ANYTOWN SUPPER CLUB, a corporation, Petitioner,	)	CIVIL NO._____
-vs-	)	
DEPARTMENT OF REVENUE and STATE TAX APPEAL BOARD, agencies of the State of Montana,	)	PETITION FOR JUDICIAL REVIEW
and	)	
ROBERT ROE and VICTOR VANGOE, a partnership doing business under the name of Blackacre Bar & Grill in the State of Montana, Respondents.	)	

COMES NOW the Anytown Supper Club and states and alleges as follows:

1. Petitioner brings this action to obtain judicial review of a final decision in a contested case, pursuant to 82-4216, R.C.M. 1947.

2. The decision was rendered by the State Tax Appeal Board on July 2, 1978, affirming a decision of the Department of Revenue rendered June 6, 1978. The Department of Revenue and the State Tax Appeal Board each maintains its principal office in the city of Helena, in Lewis and Clark County.

3. Petitioner is aggrieved by this final decision in that it permits Robert Roe and Victor VanGoe to transfer their license to carry on the retail sale of liquor, beer and wine from Caucus, Montana to Anytown, Montana, to compete with petitioner's business involving the retail sale of liquor, beer and wine in Anytown, Montana to the extent that petitioner will lose a portion of said business and be damaged thereby.

4. Substantial rights of the petitioner have been prejudiced because the final decision of the State Tax Appeal Board:

Form 13 (continued)

(a) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(b) does not contain a finding of fact relative to the applicant's anticipated profits which was requested by the petitioner and which is essential to the decision; and

(c) is arbitrary and capricious in its findings as to restaurants with beverage service in the quota area.

WHEREFORE, petitioner prays that the Court grant the following relief:

1. Enter an order reversing the decision of the State Tax Appeal Board and declaring that the Order Approving Transfer of the Department of Revenue dated June 6, 1978 is not warranted by the record in this proceeding.

2. Such other and further relief as may seem proper.

DATED this 23rd day of July, 1978.

_____

(NOTE: The economic losses of a competitor are probably not grounds for declining to issue a liquor license.)

Form 14

NOTICE--PROPOSED SUSPENSION OF LICENSE

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the all-beverage license of Blackacre Bar & Grill, Inc.)	NOTICE OF PROPOSED SUSPENSION OF LICENSE AND HEARING THEREON

TO: Blackacre Bar & Grill, Inc.
1889 Statehood Ave.
Anytown, Montana

1. At 10 a.m. on September 19, 1978, in Room 400 of the Sam W. Mitchell Building, Helena, Montana, a hearing will be held for the suspension of all-beverage license no. 1791 issued to Blackacre Bar & Grill, Inc.

2. This hearing is held under authority of section 4-4-402, R.C.M. 1947, and ARM 42-2.12(6)-S12018 of the department's rules. Violation of ARM 42-2.12(6)-S12015 is alleged in that:

(a) On August 12, 1978 the premises of the Blackacre Bar & Grill were in a condition not permitted under the fire code in that an exit was blocked.

3. You are entitled to attend this hearing and to present evidence and arguments on all issues involved in this action.

4. You have a right to be represented by counsel at the hearing. If you desire to contest the proposed department action, you must notify John Doe, Administrator, Liquor Division, Department of Revenue, Mitchell Building, Helena, Montana 59601 within fifteen days of service of this notice on you. Failure to so notify Mr. Doe will result in suspension of your license on the date of the hearing.

DATED: August 28, 1978.

PETER POE, Director
Department of Revenue

Form 15

REQUEST FOR HEARING AND
APPLICATION FOR MORE DEFINITE STATEMENT

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the all-beverage license of Blackacre Bar & Grill, Inc.	)))	REQUEST FOR HEARING; APPLICATION FOR MORE DEFINITE STATEMENT

COMES NOW the Blackacre Bar & Grill, Inc., Respondent, and requests an opportunity to be heard on the issues in the notice issued August 28, 1978 in the above-entitled matter. Respondent also applies for a more definite statement of the issues involved, to-wit:

(a) the citation and particular section of the fire code alleged to have been violated;

(b) the time of the alleged violation; and

(c) the term of the proposed suspension.

DATED: September 6, 1978.

CHARLES COE, Attorney for
Blackacre Bar & Grill, Inc.

Form 16

AMENDED NOTICE--MORE DEFINITE STATEMENT

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the all-beverage license of Blackacre Bar & Grill, Inc.	))))	AMENDMENT OF NOTICE FOR MORE DEFINITE STATEMENT

Pursuant to application filed September 6, 1978 by the respondent in the above-entitled action, the notice of August 28, 1978 is amended in the following particulars:

Paragraph No. 1 is amended by adding at the end thereof this sentence: "The term of the suspension is proposed to be not less than four nor more than seven days."

Paragraph No. 2 is amended by revising subsection (a) to read as follows: "(a) On August 12, 1978, between the hours of 9:00 p.m. and 9:30 p.m., the premises of the Blackacre Bar & Grill were in violation of rule ARM 23-2.10B(1)-S1010 of the Fire Marshal Bureau, Montana Department of Justice, namely section 8-2.4.3 of the Life Safety Code (1976), which requires that two separate doors or exists must open to provide egress from the premises of a Class C place of assembly and section 17-1.2.1 of said code, which states that every required exit shall be continuously maintained free of all obstructions or impediments to full instant use in the case of fire or other emergency, in that one of the required exists was blocked by musical equipment belonging to a band playing in the bar."

DATED: September 13, 1978.

JOHN DOE, Administrator
Liquor Division
Department of Revenue

Form 17

MOTION FOR SUMMARY DECISION

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the all-beverage license of Black-acre Bar & Grill, Inc.	)))	MOTION FOR SUMMARY DECISION

COMES NOW the Blackacre Bar & Grill, Inc., Respondent, and moves that the Department of Revenue dismiss the above-entitled action against it on the grounds that no evidence was taken to establish that Respondent's premises did or could contain at least 50 persons so as to constitute a Class C place of assembly under the Life Safety Code (1976).

DATED: September 20, 1978.

_____
CHARLES COE
Attorney for Respondent

Form 18

CONSENT ORDER

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the all-beverage license of Blackacre Bar & Grill, Inc.) CONSENT ORDER

This matter having been heard, the parties thereto agree as follows:

1. The Montana Department of Revenue hereby reprimands the respondent Blackacre Bar & Grill, Inc., for having suffered the blockage of a second exit leading from its premises during the evening of August 12, 1978.

2. The respondent Blackacre Bar & Grill, Inc., hereby promises to permanently install a sign on the interior side of the door in question, in letters at least three inches high, reading "FIRE DOOR--DO NOT BLOCK."

3. The Montana Department of Revenue hereby dismisses further proceedings against the respondent under the notice of August 28, 1978.

DATED: September 22, 1978.

_____
For the Department of Revenue

_____
For Blackacre Bar & Grill, Inc.

Form 19

PETITION FOR DECLARATORY RULING

BEFORE THE FIRE MARSHAL BUREAU
DEPARTMENT OF JUSTICE
STATE OF MONTANA

IN THE MATTER OF the application of Blackacre Bar & Grill, Inc., for a declaratory ruling on the place of assembly standards of the Life Safety Code.	)))))	PETITION FOR DECLARATORY RULING

1. Petitioner's name and address is Blackacre Bar & Grill, Inc., 1889 Statehood Ave., Anytown, Montana.

2. Facts presented: Petitioner is a tavern and restaurant business. The customer capacity of petitioner's premises is 44 based on the number of seats available. Not more than 4 persons are employed at any one time on the premises as bartenders, waiters, etc. Occasionally a band of 3 musicians is engaged; this reduces the customer seating capacity to 38. When the band is playing a few tables may be moved so as to allow limited space for dancing. The area of the floor space is 700 square feet.

3. Rules involved: Chapter 8 of the Life Safety Code (1976) deals with places of assembly and defines a class C place of assembly as one with a capacity of 50 to 300 persons. Capacity under the code is determined by maximum occupancy load. This is calculated in section 8-1.5.1 as 7 square feet per person in an area of concentrated use such as a dance floor and 15 square feet per person in an area of less concentrated use such as a drinking establishment.

4. Question presented: Whether petitioner's occupancy loan should be calculated on the basis of 15 square feet per person, which yields a capacity of 46.7 persons, or on the basis of 7 square feet per person, which yields a capacity of 100 persons.

5. Petitioner's contention: When petitioner hires a band to play dance music, every customer on the premises desires to have one of the 38 available seats. If no seats are available, the customers do not enter. Thus, when a small portion of the floor space--not more than 10%--is used for dancing, the de facto occupancy does not exceed 47 persons. Further, the determinative use of the premises should be the usual and customary use, not an occasional use. Therefore, petitioner's premises should not be treated as a class C place of assembly under the Life Safety Code.

Form 19 (continued)

6. Ruling requested: That the use of petitioner's assembly area for purposes of section 8-1.5.1 of the Life Safety Code (1976) is the usual and customary use of that area; that when actual occupancy does not exceed 50 persons even when a small portion of the floor space is occasionally used in a more concentrated way as a dance floor, no reason exists to consider the occasional use as controlling over the usual and customery use for fire code purposes; and that under these circumstances, petitioner's premises are not a class C place of assembly.

7. Petitioner knows of no other person similarly affected; the chief of the Anytown Building Inspection Department is known to be an interested person.

DATED: August 17, 1978.

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Form 20

CHECKLIST OF LEGISLATIVE ROLES IN ADMINISTRATIVE RULEMAKING

I. INDIVIDUAL MEMBER

A. During session

1. Introduce joint resolution to repeal, amend, or compel adoption of rule.

B. During interim

1. Petition on behalf of interested party for adoption, amendment, or repeal of rule.
2. As one of 20 members, demand poll of all members on consistency of proposed rule with legislative intent.

II. ADMINISTRATIVE CODE COMMITTEE

A. During session

1. Introduce joint resolution, same as individual members.
2. Recommend amendments to MAPA in report to legislature.

B. During interim

1. Poll all members on consistency of proposed rule with legislative intent.

C. At any time

1. Review proposed rules and

   (a) submit recommendations,
   (b) require that public hearing be held,
   (c) shift burden of proof in any later suit challenging validity of rule by objecting to rule on grounds of inconsistency with documented legislative intent.

2. Determine frequency of publication of Register.
3. Advise Secretary of State on fees for Register subscriptions and agency filings for publication in Register.

Form 21

HEARING EXAMINER'S CHECKLIST

I. PRE-HEARING PREPARATION

A. Review MAPA provisions on contested cases; review statutes on contested case procedure relating to the particular agency; review model procedural rules and any additions or amendments thereto as adopted by the particular agency.

B. Review pleadings submitted by the contesting parties (complaints, notices of agency action and opportunity for hearing, answers of affected parties).

C. Order pre-hearing conferences for purposes of determining agreed and contested facts and issues and write pre-hearing order to govern place, time, and conduct of hearing, and schedule for filing preliminary motions.

D. Entertain, and rule on motions relating to any issues that should be decided prior to hearing.

E. Remember restrictions on ex parte consultations.

F. Open meetings procedure (Section 82-3402, R.C.M. 1947), and public participation requirements (Section 82-4228, R.C.M. 1947).

II. THE HEARING

A. Preparation

1. Confirm and visit hearing room; insure adequate seating, arrange seating for litigants, witnesses, hearing officer, reporter, counsel, and any agency members.

B. Opening the Hearing

1. Call hearing to order.

2. Identify name and number of the case and brief history of how the case became contested before the agency.

3. Introduce self as hearing examiner, your authority to conduct the hearing and the nature of your appointment; introduce agency members present and explain their function.

Form 21 (continued)

4. Refer to the agency's statutory authority to conduct the hearing.

5. Reference the statutory and rule provisions for conduct of the hearing (actual reading of such provisions may be omitted, however they should be explained to counsel and/or contesting parties prior to opening hearing. Entertain any procedural questions especially where litigants are not represented by counsel.

6. Explain order of presentation.

III. CONDUCT OF HEARING

A. Afford opportunity for opening statements -- summary of facts and argument.

B. Commence with statement and evidence of agency or petitioner in support of its action.

1. Direct and cross examination of agency or petitioner witnesses; hearing examiner or reporter swears in each witness; exhibits are marked.

C. Statement and evidence of affected parties disputing agency action or petitioner request.

1. Same as B(1) above.

D. Agency or petitioner rebuttal testimony.

E. Surrebuttal.

F. Questions from agency members.

G. Closing statements.

H. Control of the hearing; insure that only one person is speaking at once.

I. Hearing examiner should take sufficient notes to make findings and recommendations without transcript.

J. Close hearing.

IV. POST HEARING MATTERS

A. Order Proposed Findings of Fact, Conclusions of Law, and briefs from parties; set time schedule.

B. Explain statutory authority and role of hearing examiner in final agency decisions.